TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909

No. [redacted]68.

J. H. FRIDAY, GEORGE E. HARDIE, CHARLES C. HENZEL, ET AL., PETITIONERS,

vs.

HALL AND KAUL COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

PETITION FOR CERTIORARI FILED FEBRUARY 3, 1908.
CERTIORARI AND RETURN FILED MARCH 17, 1908.

(21,003.)

(21,003.)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1908.

No. 266.

J. H. FRIDAY, GEORGE E. HARDIE, CHARLES C. HENZEL, ET AL., PETITIONERS,

vs.

HALL AND KAUL COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., FEBRUARY 18, 1909.

a

File No. 1043.

Transcript of Record.

United States Circuit Court of Appeals for the Third Circuit.

No. —, October Term, 1907.

HALL AND KAUL COMPANY, a Corporation Organized and Existing under the Laws of the State of Pennsylvania, and a Resident of said State, Judgment Creditors, Appellant,

vs.

J. H. FRIDAY, GEORGE E. HARDIE, and CHARLES C. HENZEL, Residents of the State of Pennsylvania, Petitioning Creditors, and SOUTHSIDE TRUST COMPANY, Receiver, and the MONONGAHELA CONSTRUCTION COMPANY, Bankrupt, Appellees.

Appeal from the District Court of the United States for the Western District of Pennsylvania.

Filed August 2, 1907.

1

Docket Entries.

Case No. 3480.

In the Matter of J. H. FRIDAY ET AL.,

vs.

MONONGAHELA CONSTRUCTION COMPANY, ALLEGHENY.

Jan. 26, 1907. Creditors' petition in duplicate filed at 12 M.

Jan. 26, 1907. Subpœna awarded: returnable the 9th proximo.

Jan. 25, 1907. Subpœna and copy of creditors petition issued to Marshal.

Jan. 26, 1907. Statement of said Company admitting its insolvency and its willingness to be adjudged bankrupt filed.

Jan. 28, 1907. Petition for injunction and order of Referee under date of 28th instant, in Judge's absence restraining Hall & Kaul Company, Elk Engineering Works, George Decker, and Kaul & Hall Lumber Company, returnable the 4th proximo received and filed.

Jan. 28, 1907. On petition of J. H. Friday, a petitioning creditor filed, and on motion of McKee, Mitchell and Patterson, his attorneys order made appointing the South Side Trust Company Receiver: said Receiver to give bond in $5,000.00.

Jan. 28, 1907. Bond of petitioning creditor on appointment of Receiver and order approving same, filed.

Jan. 28, 1907. Bond of said Receiver and order approving same, filed.

Feb. 1, 1907, copy of said writ of injunction and proof of service of same filed.

Feb. 5, 1907. Answer and demurrer to creditors' petition by Hall & Kaul Company filed.

Feb. 5, 1907. Order of William R. Blair, Referee, in Judge's absence, dismissing motion to dissolve injunction filed.

Feb. 7, 1907. Said subpoena returned by Marshal unserved under rule ten, general orders in bankruptcy and filed.

Feb. 7, 1907. answer of said alleged bankrupt admitting the facts set forth in creditors' petition and its willingness to be adjudged bankrupt filed.

Feb. 7, 1907. Precipe for rule to take depositions of going witnesses filed.

2 Feb. 7, 1907. On petition of said Receiver filed and on motion of McKee, Mitchell & Patterson, its attorneys, restraining order granted against the Standard Building Construction Company, returnable the 20th instant.

Feb. 9, 1907. On petition of said receiver filed, and on motion of McKee, Mitchell & Patterson, its attorney, order made that the contracts made with the Pittsburgh & Lake Erie Railroad Company mentioned in said petition be cancelled upon the moneys in the hands of said railroad for work done on said contracts by said bankrupt, subject to valid liens thereto and that all plant equipment, machinery and material belonging to, used in and about the performance of said contract, be delivered to said Receiver, that the contracts with the Wabash Railroad Company be declared forfeited, with the exception of the contract for the remodeling of the National Packing Company Warehouse, and that the agreement concerning the same be entered into by said receiver.

Feb. 11, 1907. On petition of said receiver filed and on motion of McKee, Mitchell and Patterson, order made directing it to pay freight and demurrage upon cars mentioned in said petition, that said railroad release the lien of said charges from the plant and equipment of said construction company, and authorizing receiver to pay for unloading said cars, and storage of same and costs of watching goods of said alleged bankrupt.

Feb. 15, 1907. Said debtor adjudged bankrupt and matter referred to William R. Blair, Referee at Pittsburgh, for further proceedings.

Feb. 15, 1907. Copy of order of reference issued.

Feb. 18, 1907. Agreed statement of facts on the question raised by petition and answer filed.

Feb. 18, 1907. Order made that decree of adjudication and order of reference thereunder be revoked.

Feb. 19, 1907. Agreed statements of fact filed.

March 6, 1907. On Petition filed, order made authorizing said receiver to sell certain personal property located at Saw Mill Run and Mahoningtown and certain cement to the Dravo Contracting Company and approving rental of equipment at Saw Mill Run to said Company.

March 15, 1907. Appointment, oath and report of appraisers filed.

April 9, 1907. On Petition of J. B. Booth & Co., et al. and on motion of Marion H. Murphy, their attorney, order made allowing amendment to creditors' petition and directing that same be filed.

April 12, 1907. Argument on motion to dismiss petition of creditors for adjudication, by A. J. Barron for Receiver, G. L.
3 Roberts for accepting creditors, and Marion H. Murphy for petitioning creditors, C. A. V.

April 17, 1907. Opinion of court handed down "that said alleged bankrupt is a corporation engaged principally in manufacturing and that the motion of the execution creditors for the dismissal of the petition must be denied and an adjudication in bankruptcy be made."

April 19, 1907. Said debtor adjudged bankrupt, and matter referred to William R. Blair, Referee at Pittsburgh, for further proceedings.

April 19, 1907. Copy of order of reference issued.

April 29, 1907. Bankrupt's schedules in triplicate filed and duplicate mailed to referee.

April 29, 1907. Motion for reargument denied.

April 29, 1907. On petition of Hall & Kaul Company filed, order made granting a petition for revision in the matter of law in said case, to the Circuit Court of Appeals for the Third Circuit.

April 29, 1907. Bond of said petitioners on appeal and order approving same filed.

April 29, 1907. Assignment of error filed.

April 29, 1907. Citation issued.

April 29, 1907. Acceptance of service of said citation filed.

May 29, 1907. Order made extending time for filing record in Circuit Court of Appeals to September 1, 1907.

Appearances.

Marion H. Murphy, Pittsburgh, Pa., for petitioning creditors.

McKee, Mitchell & Patterson, for Receiver.

W. C. Neill and George L. Roberts, for Creditors opposing adjudication.

To the Honorable Joseph Buffington, Judge of the District Court of the United States, for the Western District of Pennsylvania:

The petition of J. H. Friday of Pittsburgh, Pa., and George E. Hardie of Pittsburgh, Pa., and Charles C. Henzel of Pittsburgh, Pa., respectfully shows:

That Monongahela Construction Company, a corporation under the laws of the State of Pennsylvania, of Pittsburgh, Pa., engaged principally in manufacturing, has for the greater portion of six months next preceding the date of filing this petition, had its principal place of business (or resided, or had h- domicile) at Pittsburgh, in the County of Allegheny and State and District aforesaid, and owes debts to the amount of $1,000.00.

4 That your petitioners are creditors of said Monongahela Construction Company having provable claims amounting in the aggregate, in excess of securities held by them, to the sum of $500.00. That the nature and amount of your petitioners claims are as follows:

J. H. Friday, claim for $14,500.00 for money loaned to said company and the payment of notes of said company on which he was endorser which notes said company failed to pay.

George E. Hardie, claim for $100.00 for services rendered said company as manager.

Charles C. Henzel, claim for $50.00 as foreman for said company.

And your petitioners further represent that said Monongahela Construction Company is insolvent, and that within four months next preceding the date of this petition the said Monongahela Construction Company committed an act of Bankruptcy, in that it did, heretofore, to wit, on the 26th day of January, 1907, admit in writing its inability to pay its debts and its willingness to be adjudged a bankrupt on that ground.

Wherefore, your petitioners pray, that service of this petition, with a subpoena, may be made upon Monongahela Construction Company, as provided in the Acts of Congress relating to bankruptcy, and that he may be adjudged by the Court to be a bankrupt within the purview of said Acts.

J. H. FRIDAY
GEO. E. HARDIE.
CHARLES C. HENZEL.

MARION H. MURPHY, *Attorney.*

Address, 440 Diamond St. Pittsburgh, Pa.

UNITED STATES OF AMERICA,
Western District of Pennsylvania, ss:

J. H. Friday, George E. Hardie and Charles C. Henzel, being all of the petitioners above named, do hereby make solemn oath that the statements contained in the foregoing petition, subscribed by them are true.

J. H. FRIDAY.
GEO. E. HARDIE.
CHARLES C. HENZEL.

5 Sworn and subscribed before me, this 26th day of January, 1907.

MARION H. MURPHY,
[SEAL.] *Notary Public.*

My Commission expires January 16, 1909.

Endorsed: Docket 8. Case No. 3480, Page 36. In Bankruptcy. United States District Court, Western District of Pennsylvania. In the matter of Monongahela Construction Company against whom a petition for adjudication in bankruptcy was filed. Creditor's Petition. Filed this 26th day of January, A. D. 1907, at 12 o'clock M. Wm. T. Lindsey, Clerk of said U. S. District Court. Marion H. Murphy Attorney.

To the Honorable Nathaniel Ewing, Judge of the District Court of the United States, for the Western District of Pennsylvania:

The petition of Harbison-Walker Refractories Co. of Pittsburgh, Pa., and J. B. Booth & Co. of Pittsburgh, Pa., and Gevaseo Roofing

Co., a corporation of New Jersey, registered and doing business in Pennsylvania, respectfully shows:

That Monongahela Construction Company, a corporation engaged principally in manufacturing and mercantile pursuits, of Pittsburgh, Penna., has, for the greater portion of six months next preceding the date of filing this petition, had its principal place of business (or resided, or had h- domicile) at Pittsburgh, in the County of Allegheny, and State and District aforesaid, and owes debts to the amount of $1,000.00;

That your petitioners are creditors of said Monongahela Construction Company having provable claims amounting in the aggregate, in excess of securities held by them, to the amount of $500.00. That the nature and amount of your petitioners claims are as follows:

Harbison-Walker Refractories Company, one thousand fifty-two and 33/100 dollars ($1,052.33) for merchandise and supplies sold and delivered to said Monongahela Construction Company during year 1906.

J. B. Booth & Co., two hundred thirty-seven and 75/100 dollars ($237.75), for material sold and delivered to the Monongahela Construction Company, the same being in judgment at No. 408, March Term, 1907, Common Pleas Court of Allegheny County, Pa.

Gevasco Roofing Company, seven hundred dollars ($700.00), for work done and material furnished in manufacturing asphalt floor on second story of Wabash Warehouse, City of Pittsburgh, on or about Oct. — 1906, as per contract and also two hundred and fifty-eight and 10/100 dollars ($258.10) for extra work done in
6 connection therewith at the request of said Monongahela Construction Co., for which said company agreed to pay and which sum of $258.10 is the reasonable value thereof.

And your petitioners further represent that the said Monongahela Construction Company is insolvent and that within four months next preceding the date of this petition the said Monongahela Construction Company committed an act of bankruptcy, in that it did heretofore, to wit, on the — day of January, 1907, admit in writing its inability to pay its debts and its willingness to be adjudged a bankrupt on that ground.

Wherefore, your petitioners pray, that service of this petition with a subpoena, may be made upon

as provided in the Acts of Congress relating to bankruptcy, and that he may be adjudged by the court to be a bankrupt within the purview of said Acts.

J. B. BOOTH & CO.,
By J. B. BOOTH, *Proprietor.*
HARBISON-WALKER REFRACTORIES CO.,
HAMILTON STEWART, *Secretary.*
GEVASCO ROOFING CO.,
By L. M. MESSOMMIER, *Cashier.*
Petitioners.

MARION H. MURPHY, *Attorney.*

Address, Berger Building, Pittsburg, Pa.

UNITED STATES OF AMERICA,
Western District of Pennsylvania, ss:

J. B. Booth of J. B. Booth & Co., Hamilton Stewart, Secretary of Harbison-Walker Refractories Company and L. Messommier, Cashier of Gevasco Roofing Company, being all of the petitioners abovenamed, do hereby make solemn oath that the statements contained in the foregoing petition, subscribed by them, are true.

J. B. BOOTH.
HAMILTON STEWART.
L. MESSOMMIER.

Sworn and subscribed before me this 6th day of April, 1907.

MARION H. MURPHY,
[SEAL.] *Notary Public.*

My commission expires January 15, 1909.

7 In the District Court of the United States for the Western District of Pennsylvania.

No. 3480. In Bankruptcy.

J. H. FRIDAY ET AL.
vs.
MONONGAHELA CONSTRUCTION COMPANY.

To the Honorable the Judge of said District Court:

The petition of J. B. Booth & Co., Harbison-Walker Refractories Company, and Gevasco Roofing Co., respectfully represents:

That they are creditors of the Monongahela Construction Company.

That on January 26, 1907, a petition in bankruptcy was filed by J. H. Friday *et al.* against the said Monongahela Construction Company:

That certain objections have been filed by Hall and Kaul, objecting to said Monongahela Construction Company being adjudged bankrupt alleging *inter alia* that the creditors in said petition were not proper persons to file said petition.

Your petitioners aver that they are creditors of the said Monongahel*d* Construction Company and ask leave to join in said petition and be made parties to said proceeding, and they will ever pray, etc.

J. B. BOOTH & CO.,
By J. B. BOOTH, *Proprietor.*
HARRISON-WALKER REFRACTORIES CO.
HAMILTON STEWART, *Secretary.*
GEVASCO ROOFING CO.,
By L. M. MESSOMMIER, *Cashier.*

UNITED STATES OF AMERICA,
Western District of Pennsylvania, ss:

J. B. Booth, Hamilton Stewart and L. Messommier, of the above named petitioners, do hereby make solemn oath that the statements contained in the foregoing petition, subscribed by them, are true.

J. B. BOOTH.
HARRISON-WALKER REFRACTORIES CO.
HAMILTON STEWART, *Secretary.*
L. MESSOMMIER.
Cashier of Gerasco Roofing Co.

8 Sworn and subscribed before me, this 6th day of April, A. D. 1907.

MARION H. MURPHY.
[SEAL.] *Notary Public.*

My Commission Expires January 15, 1909.

Endorsed: No. 3480. In Bankruptcy. In the matter of Monongahela Construction Company, Bankrupt. Amendment to Creditors' Petition. Now, to wit, April 9, 1907, within petition presented in open court and upon consideration thereof same is ordered to be filed. *Per Curiam.* Filed April 9, 1907.

In the District Court of the United States for the Western District of Pennsylvania.

No. 3480. In Bankruptcy.

In the Matter of MONONGAHELA CONSTRUCTION COMPANY, Bankrupt.

A petition in involuntary bankruptcy having been filed in the above entitled case against the said Monongahela Construction Company by J. H. Friday, *et al.*, and answer thereto having been filed by Hall & Kaul Company of Ridgeway, Pa., judgment creditors, objecting to the petition in bankruptcy of said company, for the following reasons:

1st. That neither the petitioners nor the form of petition *are* within the requirements of the bankruptcy act of 1896.

2nd. That the records do not show that said corporation has complied with the corporation laws of the State of Pennsylvania.

3rd. That as a corporation, the nature of the business in which it is engaged is not such as will give this court jurisdiction under said bankrupt act of 1898 or its supplements.

Now, therefore, in order that the questions raised by the petition and answer may be properly determined by this court, the following facts are admitted and agreed upon by the parties hereto:

1. That the Monongahela Construction Company succeeded the Hill Construction Company, a corporation organized and existing under the laws of the State of Pennsylvania, having been incorporated on the 23rd day of May, 1905, and by resolution of the Board of Directors, the said Hill Construction Company changed its name to the Monongahela Construction Company on the 19th day of February, 1906, but that the certificate of such change was not recorded in the County of Allegheny, State of Pennsylvania, where its principal office is located, until February 9, 1907, — days after the petition in this case was filed.

2. That the purpose for which the said Hill Construction Company was organized and created, as set forth in its charter, was as follows: "Corporation is formed for the purpose of constructing, erecting, and repairing railroads, traction lines, duly incorporated, and streets, roads, buildings, structures, works or improvements of public or private use or utility."

3. That the business of the said Monongahela Construction Company has been making, constructing and erecting concrete arches, bridges, buildings, walls and other structures; also excavating, grading and ballasting of roadbeds and laying tracks for railroads. With the exception of the contract with the P. S. & N. R. R. for the making of roadbed and laying of track from Detsch to Paine, Elk County, Pennsylvania, and the remodeling of a warehouse, in which concrete work is the chief item, all the other contracts at the time of the filing of the petition in this case, and the business in which the company has been engaged during the past year has been making and constructing arches, walls, and abutments, bridges, buildings, etc., out of concrete.

4. That in carrying on its business it buys and combines together raw materials, such as cement, gravel and sand in the making of concrete, and supplies labor, machinery and appliances necessary for the proper carrying on of said business, of constructing and erecting concrete arches, piers, buildings and structures, and excavating therefore, at such time and places, as its contracts call for. That it carries on no other manufacturing business except the above. The question whether this business is manufacturing or not is left to the determination of the court.

5. That its principal place of business is in the City of Pittsburgh, County of Allegheny, and State of Pennsylvania, where its office is located. It has no permanent shop or factory, but has a warehouse at 19th Street, South Side.

6. That J. H. Friday, the principal petitioning creditor, is the father of J. A. Friday, President of the Monongahela Construction Company, and that George E. Hardie and Charles Hensell are employees of said company, and their claims are for salaries.

7. That in the petition filed in this case, the following words are written: "Engaged principally in manufacturing."

8. That the Monongahela Construction Company, the alleged bankrupt, on the 13th day of February, 1907, made a voluntary assignment for the benefit of creditors, in favor of the South Side Trust

9

Company, Receiver, which was filed in the Court of Common
10 Pleas No. 1 of Allegheny County, Pennsylvania, at No. 979, March Term, 1907.

MARION H. MURPHY,
Attorney for J. H. Friday et al.
McKEE, MITCHELL & PATTERSON,
Attorneys for South Side Trust Company of Pittsburgh, Receiver of Monongahela Construction Company, Bankrupt.
GEORGE L. ROBERTS,
WILLIAM C. NEILL,
Attorneys for Hall & Kaul Company.

Endorsed: No. 3480 in bankruptcy. United States District Court, Western District of Pennsylvania. *In Re* Monongahela Construction Company, Bankrupt. Agreed Statement of Facts. Filed Feb. 18, 1907.

In the District Court of the United States for the Western District of Pennsylvania.

No. 3480. In Bankruptcy.

In the Matter of THE MONONGAHELA CONSTRUCTION CO.

EWING, *J.:*

The Monongahela Construction Company is a corporation of the State of Pennsylvania, and on January 26, 1907, a creditors' petition was filed against it, as a corporation "engaged principally in manufacturing," alleging as an act of bankruptcy that on that day it had admitted in writing its inability to pay its debts and its willingness to be adjudged a bankrupt on that ground. On February 7th, 1907, said corporation filed its answer to the subpœna, admitting the facts in the petition and its willingness to be adjudged a bankrupt, and on February 15th it was duly adjudged a bankrupt and the case referred to William R. Blair, Referee.

On January 28th, 1907, on application to the Referee and upon certificate of the Judge's absence, a restraining order was issued against the Hall-Kaul Company, a corporation, F. H. Murray and T. J. Harrigan, partners doing business as the Elk Engineering Works, George Decker and the Kaul-Hall Lumber Company, all execution creditors of the said Construction Company, commanding them to abstain from any and all interference, by execution,
11 levy, sale, or any other manner whatever, with the property of said Construction Company until the further order of this court.

On February 5th, 1907, the said Hall-Kaul Company filed an answer, alleging, among other things, that said Construction Company is not "engaged principally in manufacturing" and denying that it is engaged in any business provided for in the Bankruptcy

Act of 1898, or any of the amendments or supplements thereto, and with said answer filed a motion to dismiss the petition in bankruptcy for this reason.

On February 18th all parties consenting thereto, an order was made revoking the decree of adjudication and the reference of this case to William R. Blair, Esq., Referee, and on the same day the counsel interested filed an agreed statement of facts, the essential parts of which at this time are as follows: "That the purpose for which the said Hill Construction Company was organized and created, as set forth, in its charter, was as follows: 'Corporation is formed for the purpose of constructing, erecting and repairing, railroads, traction lines, duly incorporated, and streets, roads, buildings, structures, works or improvements of public or private use or utility.' That the business of the said Monongahela Construction Company (successor of the Hill Construction Company) has been making, constructing, and erecting concrete arches, bridges, buildings, walls, and other structures; also excavating, grading and ballasting of roadbeds and laying track for railroads. With the exception of the contract with the P. S. & N. R. R. for the making of roadbed and laying track from Detsch to Paine, Elk County, Pennsylvania, and the remodeling of a warehouse, in which concrete wark is the chief item, all the other contracts at the time of the filing of the petition in this case, and the business in which the company has been engaged during the past year has been making and constructing arches, walls and abutments, bridges, buildings, etc., out of concrete. That in carrying on its business it buys and combines together raw materials, such as cement, gravel and sand in the making of concrete, and supplies, labor, machinery and appliances necessary for the proper carrying on of said business of constructing and erecting concrete arches, piers, buildings and structures, and excavating therefor, at such time and places as its contracts call for. That it carries on no other manufacturing business except the above. The question whether this business is manufacturing or not is left to the determination of the court."

The last sentence above quoted constitutes the question for decision here, for the other matters alleged in the answer filed by the Hall-Kaul Company were not insisted upon at the argument, and the other matters set forth in the statement of facts are not material in this inquiry.

12 The Construction Company has its principal place of business in the City of Pittsburgh, where its office is located, has no permanent shop or factory, but maintains a warehouse at 19th Street, South Side, where it keeps its tools and the material it may have on hand and out of which the concrete it uses is made. It is not contended that it manufactures any concrete except upon the ground where the structure which it has a contract for erecting is located.

The method it pursues when it has any contract to fill is to assemble its sand, cement and gravel on the ground where its contract work is to be performed, and there mix those articles in the proper proportions in a machine constructed for that purpose, having first

made a wooden mould of the character and size of the bridge or arch, etc., to be constructed on the location therefor, and then after the concrete articles are properly mixed to pour them into this mould and let them harden there in place, so that the final result is a completed solid bridge or arch of concrete, from which, after hardening the wooden mould is removed.

Thus by far the greater part of its work consists in the proper mingling of the various constituents of the concrete, making it of the proper consistency, and then before it hardens, pouring it in place in the mould provided, and thus the complete structure is but a large piece of concrete of the proper size and form and in the desired location. This, admittedly, is the principal business conducted by this Construction Company for some time past. Is that business then one of manufacture?

Admittedly, if the concrete were made at some point devoted entirely or principally to that business and made in the shape of blocks and, after hardening, held there for sale, and transported upon sale to any point where their use was sought, the making of such blocks would be a work of manufacture. But the contention here is that because this concrete is made on the ground, attached to the soil before hardening, and when complete constitutes a permanent structure, which cannot be moved without destruction, such is not a work of manufacture.

It is difficult to see why the place where a thing is made should make any difference as to the character of the work done in making it, although it is to be admitted that most of the things that are spoken of as manufactures are articles which are capable of being transported from place to place and used when and as desired, and, in many instances, over and over again in different localities. That fact, however, does not militate against the actual character of the work in building up these concrete structures. The concrete must be first made, and that, after making, it is used before it becomes solidified and hardened in the place where it is to be finally left, and there put to harden, rather than being manufactured in one place and transported to another for use, should not, to my mind, change the character of the work.

It is said again that the process used by this company is very similar to that of the ordinary contractor in mixing and using mortar and plaster in the erection of a building; but it must be remembered that in that case the mortar and plaster constitute but a small portion of the completed structure and are mere incidents therein, while in this case the concrete is the whole of the structure, for the finished structure consists of nothing else, so that it is not only the principal work, but the entire work in the conduct of this business.

Undoubtedly there are forms of bridge building in which those engaged actually perform no manufacturing labor, but are content simply with assembling and putting together the material which has been prepared by others elsewhere and transported to the ground; but in this concrete work, the labor is not of that character, but, as we have seen, consists first, and principally, in the making of the

concrete itself, and then placing it, while in an unfinished condition, in the mould of the structure desired.

It may be admitted that in ordinary parlance we speak of the erection, not the manufacture, of a bridge or arch or other similar structure, but that term probably came into use because of the fact that ordinarily the parts of bridges as formerly constructed were made elsewhere and simply erected upon the desired location, and at that time the concrete structure was unknown. And even if it be admitted here that the actual putting of the concrete into place is an erection rather than a manufacture, yet that is not sufficient to deprive this Company of the appellation of a manufacturing company, for the making of the concrete prior to putting it into place is a large and important, and indeed, principal part of its work, and that must, in every sense of the term, be conceded to be a manufacture.

Some stress is laid also on the fact that the charter rights of the company do not speak of manufacture, only of "constructing, erecting and repairing," but the answer to this is two fold: first, that it must have materials therewith to construct, erect and repair, and the preparations of those materials would be an incident of their business; and secondly, that the character of the actual work which they conduct, rather than the denomination of their general business, is to be considered in determining whether or not it is a manufacturing corporation.

It is conceded that the question is not entirely free from doubt and that decisions of the lower courts may be found on both sides of it, that is, both as to a liberal and a strict construction of the Bankruptcy Act in this respect; and this will probably continue to be the character of the decisions of those courts until some authoritative and final deliverance is made by the Supreme Court of the United States.

The conclusion, then, is that the Monongahela Construction Company is a corporation "engaged principally in manufactur-
14 ing" and that the motion of the execution creditors for dismissal of the petition must be denied and an adjudication in bankruptcy made.

Endorsed: No. 3480 in bankruptcy. In the matter of The Monongahela Construction Company, Bankrupt. Opinion. Filed April 17, 1907.

In the District Court of the United States for the Western District of Pennsylvania.

No. 3480. In Bankruptcy.

In the Matter of MONONGAHELA CONSTRUCTION COMPANY.

Now, to wit, April 26th, 1907, comes the petitioning creditors, Hall-Kaul Company and asks the court for reargument on their answer, and motion to dismiss the petition filed in this case, for the reason that since said cause was argued, it has been brought to the attention of the counsel that the question in controversy has been de-

cided by the Circuit Court of Appeals of the Fourth Circuit, reported in 140 Federal Reporter at Page 840, in favor of the contention of the plaintiff and against the decision of this Court.

GEO. L. ROBERTS,
W. C. NEILL,
Att'ys Hall & Kaul Co.

Endorsed: No. 3480 in bankruptcy. In the matter of Monongahela Construction Co. Now, to-wit, April 29th, 1907, the motion for a re-argument is denied, the case cited in said motion having been heretofore, on the original argument of this case, considered and regarded as readily distinguishable from this on the facts. Indeed the more I consider this question the stronger grows my opinion that these concrete bridges, arches, etc., as completed, are *made* or *manufactured* rather than built or erected altho' made on the ground and permanently located where made. *Per Curiam.* Filed April 29, ——.

Adjudication of Bankruptcy.

In the District Court of the United States for the Western District of Pennsylvania.

No. 3480. In Bankruptcy.

15 In the Matter of MONONGAHELA CONSTRUCTION COMPANY, Bankrupt.

At Pittsburgh, in said district, on the 19th day of April, A. D. 1907, before the Honorable Nathaniel Ewing, Judge of the said court in bankruptcy, the petition of J. H. Friday *et al.*, that Monongahela Construction Company be adjudged a bankrupt with the true intent and meaning of the Acts of Congress relating to Bankruptcy, having been heard and duly considered, the said Monongahela Construction Company is hereby declared and adjudged bankrupt accordingly.

Per Curiam.

Endorsed: No. 3480 in bankruptcy. United States District Court, Western District of Penna. In the matter of Monongahela Construction Company, bankrupt. Adjudication. Filed April 19, 1907.

United States Circuit Court of Appeals for the Third District, October Term, 1907.

No. —.

In re Monongahela Construction Company.

Appeal of Hall & Kaul Company.

Assignment of Errors.

This day comes Hall & Kaul the Appellants in the above entitled cause and file its assignments of errors to the decree entered by the Court below therein:

First. The Court erred in the opinion filed in this case in holding "That the Monongahela Construction Company is a corporation engaged principally in manufacturing:

Second. The Court erred in its action in overruling the motion of Appellant to dismiss the proceeding, herein, for the reason that the Monongahela Construction Company is not a corporation engaged principally in manufacturing:

Third. The Court erred in entering the decree in this cause adjudging the Monongahela Construction Company to be a bankrupt.

GEORGE L. ROBERTS,
EUGENE H. BAIRD,
W. C. NEILL,
Attorneys for Appellant.

16 Endorsed: No. 3480 in bankruptcy. In the Circuit Court of Appeals. *In re* Monongahela Construction Company. United States District Court Western District of Pennsylvania. Assignments of Error. Filed April 29, 1907.

United States Circuit Court of Appeals for the Third Circuit, October Term, 1907.

No. —.

In Bankruptcy.

In re Monongahela Construction Co.

Petition of Hall & Kaul Company for Appeal from Adjudication in Bankruptcy said Cause in the District Court of the United States for the Western District of Pennsylvania.

No. 2971. In Bankruptcy.

To the Honorable the Justices of said Court:

The petition of Hall & Kaul Company respectfully represents:

First. That the Monongahela Construction Company is a cor-

poration organized and existing under the laws of the State of Pennsylvania, with its principal office in the City of Pittsburgh, County of Allegheny and State of Pennsylvania.

Second. That the Hall & Kaul Company is a corporation organized and existing under the laws of the State of Pennsylvania, with its principal office located at St. Marys, in the County of Elk and State of Pennsylvania.

Third. That on January 26th, 1907, a creditors' petition was filed against the Monongahela Construction Company as a corporation "engaged principally in manufacturing," alleging acts of bankruptcy, and that it admitted in writing its inability to pay its debts, and thereupon a subpœna was duly issued. That on February 7th, 1907, said corporation filed its answer to the subpœna admitting the facts in the petition and its willingness to be adjudicated a bankrupt.

Fourth. That the Hall & Kaul Company are execution creditors of the Monongahela Construction Company and obtained judgments against it in the Court of Common Pleas of Elk County, on which judgment executions had been duly issued, and that on Janu-
17 ary 28th, 1907, on application of William R. Blair, Referee, and upon the certificate of the Judge's absence being filed, a restraining order was issued against the Hall & Kaul Company and certain other execution creditors of said Construction Company, restraining them from interference by execution, levy or sale, or in any manner whatever with the property of the said Construction Company.

Fifth. That on February 5th, 1907, the said Hall & Kaul Company filed its answer alleging among other things that the Construction Company is not "engaged principally in manufacturing," and denying that it is engaged in any business provided for in the bankruptcy act of 1898 or any of the amendments or supplements thereto, and at the same time, and with said answer, filed a motion to dismiss the petition in bankruptcy for this reason.

Sixth. That on February 15th, 1907, after said answer and motion had been filed, said corporation was erroneously adjudicated a bankrupt by William R. Blair, Referee, and that on the 18th day of February, 1907, all parties consenting thereto, an order was made revoking the order of adjudication and reference in this case to William R. Blair, Referee, and on the same day counsel interested filed an agreed statement of facts, setting forth among other things the purposes for which the Monongahela Construction Company (which was the amended name of the Hill Construction Company) was organized, and setting forth the business in which said Monongahela Construction Company was principally engaged, as follows:

"That the business of the said Monongahela Construction Company has been making, constructing and erecting concrete arches, bridges, buildings, walls and other structures; also excavating, grading and ballasting of roadbeds and laying track for railroads. With the exception of the contract with the P. S. & N. R. R., for the making of roadbed and laying of track from Detsch to Paine, Elk County, Pennsylvania, and the remodeling of a warehouse, in which concrete

work is the chief item, all the other contracts at the time of the filing of the petition in this case, and the business in which the company has been engaged during the past year has been making and constructing arches, walls and abutments, bridges, buildings, etc., out of concrete."

Seventh. That on April 12, 1907, said cause was duly argued upon said answer of the Hall & Kaul Company, the agreed statement of facts, and motion made by the said Haul & Kaul Company to dismiss the proceedings, and thereupon the same was considered by the Court.

Eighth. That on April 17th, 1907, the said Court filed its opinion in said cause, and entered an order holding that the Monongahela Construction Company is a corporation engaged principally in manufacturing, and denying the motion of the Hall & Kaul Company for dismissal of the petition, and ordering adjudication in bank-
18 ruptcy, to the entry of which order your petitioner, the Hall & Kaul Company, then and there objected and excepted, and at their request the bill of exception herewith filed was duly allowed and signed by the Judge of said court.

That thereafter on the 19th day of April, 1907, the said Court adjudged the Monongahela Construction Company to be a bankrupt.

Ninth. That your petitioner is informed and believes that the action of said court in entering said order holding that the Monongahela Construction Company is a corporation engaged principally in manufacturing and denying the motion of the Hall & Kaul Company for dismissal of the petition and in entering said adjudication in bankruptcy, was erroneous in matters of law and not in accordance with the decisions of this and other courts, and contrary to the act of 1898 and its amendments.

Wherefore your petitioner feeling aggrieved because of said order holding that the said Monongahela Construction Company is a corporation engaged principally in manufacturing, and because of the refusal of said court to grant the motion to dismiss the petition filed against it on behalf of the said Hall & Kaul Company, and because of the order of said court adjudicating the said Monongahela Construction Company to be a bankrupt, to be made, asks that the same may be revised in matters of law by your Honorable Court, as provided in Section 24 (*b*) of the bankruptcy act of 1898, and the rules and practice in such case provided.

HALL & KAUL COMPANY,
Petitioners.

GEORGE L. ROBERTS.
WM. C. NEILL.
EUGENE H. BAIRD.
Attorneys for Petitioners.

ELK COUNTY,
State of Pennsylvania, ss:

J. E. Jackson, being duly sworn according to law, deposes and says that he is the manager of the Hall & Kaul Company, a corpora-

tion organized and existing under the laws of the State of Pennsylvania, and that the facts set forth in said petition are true as he verily believes.

J. E. JACKSON.

19 Sworn and subscribed before me this 27th day of April, 1907.

[SEAL.] D. J. DRISCOLL,
Notary Public.

Commission Expires Jan. 28, 1911.

Order of Court.

Now, to-wit, April 29th, 1907, the foregoing petition for revision is allowed.

JOS. BUFFINGTON, *Judge.*

Bond on Appeal.

Know all men by these presents, That the Hall & Kaul Company, of St. Marys, Elk County, Pennsylvania, as principal, and B. T. Darr and F. A. Kaul of St. Marys, Pennsylvania, as sureties, are held and firmly bound unto the United States of America, in the sum of two hundred dollars ($200), lawful money of the United States of America, to be paid to the United States, for which payment well and truly to be made we bind ourselves, our heirs, executors and administrators jointly and firmly by these presents.

Signed and sealed this 27th day of April, 1907.

The condition of this obligation is such that

Whereas: the above named Hall & Kaul Company on the 29th day of April, 1907, filed in the District Court of the United States for the Western District of Pennsylvania a petition asking for a revision in the matter of law in a case pending in said court, *in re* Monongahela Construction Company in bankruptcy, No. 2974, and which petition has been allowed by the District Court.

Now, therefore, if the said Hall & Kaul Company shall carry out the said revision to the said Circuit Court of Appeals for the Third Circuit, and prosecute the same to a final decision and if any decree for costs shall be entered against it and it shall pay the same, then this obligation shall be void; otherwise to be and remain in full force and virtue.

HALL & KAUL COMPANY,
By J. K. P. HALL, *President.*
B. F. DARR. [SEAL.]
F. D. KAUL. [SEAL.]

Attest:
G. E. SIMONS, *Secretary.*

20 Signed, sealed and delivered in the presence of us.
W. P. MULHERN.
JOHN B. ROBERTSON.

And now, to-wit, April 29th, 1907, the above bond approved.

JOS. BUFFINGTON, *Judge*.

Endorsed: Original Number 3480. In Bankruptcy. United States Circuit Court of Appeals. No. 3480. October Term, 1907. *In re* Monongahela Construction Company. Appeal of Hall & Kaul from adjudication in bankruptcy and bond. Filed April 29, 1907.

In the District Court of the United States for the Western District of Pennsylvania.

Citation.

To J. H. Friday, George E. Hardie and Charles C. Henzel, petitioning creditors; Southside Trust Company, Receiver, and Monongahela Construction Company, Bankrupt, Greeting:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Third Circuit, to be holden at the City of Philadelphia, in the said Third Circuit, on the 29th day of May next, pursuant to appeal filed in the Clerk's office of the District Court of the United States for the Western District of Pennsylvania, wherein Hall & Kaul Company, a corporation, is appellant, and you are the appellee, to show cause, if any there be, why the decree rendered against the said appellant, as in said appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness my hand this twenty-ninth day of April, A. D. 1907, at the City of Pittsburgh, in said Western District of Pennsylvania.

NATHANIEL EWING,
United States District Judge.

And now, to-wit, April 29th, 1907, I hereby accept service of said Citation in Appeal.

MARION H. MURPHY,
Attorney for Petitioning Creditors.
McKEE, MITCHELL & PATTERSON,
Attorneys for Receiver.
MARION H. MURPHY,
Attorney for Bankrupt.

21 Endorsed: Original No. 3480. Bankruptcy Docket. United States District Court Western District of Pennsylvania. Hall & Kaul Company, a corporation, Plaintiff in Error *vs.* J. H. Friday, George E. Hardie and Charles C. Henzel, petitioning creditors; Southside Trust Company, Receiver; and Monongahela Construction Company, Bankrupt, Defendants in Error. Filed April 29, 1907.

In the District Court of the United States for the Western District of Pennsylvania.

No. 3480. In Bankruptcy.

In the Matter of MONONGAHELA CONSTRUCTION COMPANY, Bankrupt.

An appeal having been taken from the adjudication in the above entitled case by the Hall & Kaul Company, judgment creditors, to the Circuit Court of Appeals of the Third Circuit, it is hereby stipulated and agreed that only the material part of the record shall be printed by the appellant in its paper book, to wit:

1st. Docket Entries.

2nd. Such portion of the original petition as shows that said bankrupt was "engaged principally in manufacturing," and such portion of the amended petition as shows that it was "engaged principally in manufacturing and mercantile pursuits."

3rd. The agreed statement of facts.

4th. The opinion of the court.

5th. Adjudication in bankruptcy.

MARION H. MURPHY,
Attorney for Petitioning Creditors.
McKEE, MITCHELL & PATTERSON,
Attorneys for Receiver.
GEO. L. ROBERTS,
W. C. NEILL,
Attorney for Hall-Kaul Company.

Endorsed: No. 3480. In Bankruptcy. In the matter of Monongahela Construction Company. Stipulation.

22 In the District Court of the United States for the Western District of Pennsylvania.

Original No. 3480. In Bankruptcy.

HALL & KAUL COMPANY, a Corporation, Plaintiff in Error,
vs.
J. H. FRIDAY, GEORGE E. HARDIE, and CHARLES C. HENZEL, Petitioning Creditors, SOUTHSIDE TRUST COMPANY, Receiver, and MONONGAHELA CONSTRUCTION COMPANY, Bankrupt, Defendants in Error.

And now, to-wit May 29th, 1907, on motion of counsel in interest, it is hereby ordered that the time for filing the copy of record herein in the United States Circuit Court of Appeals for the Third Circuit, be, and it hereby is extended until September 1st, 1907.

Per Curiam.

Counsel for appellee hereby agree to the above order.
McKEE, MITCHELL & PATTERSON,
ALEXANDER J. BARRON.

Endorsed: Original No. 3480. In Bankruptcy. United States District Court. Western District of Pennsylvania. Hall & Kaul Company, a corporation, Plaintiff in Error *vs.* J. H. Friday, George A. Hardie and Charles C. Henzel petitioning creditors, Southside Trust Company, Receiver, and Monongahela Construction Company, Bankrupt, Defendants in Error. Order extending time for filing record in the Circuit Court of Appeals for the Third Circuit. Filed May 29, 1907. Wm. T. Lindsey, Clerk.

In the District Court of the United States for the Western District of Pennsylvania.

No. 3480. In Bankruptcy.

In the Matter of MONONGAHELA CONSTRUCTION COMPANY, Bankrupt.

I, William T. Lindsey, Clerk of the District Court of the United States for the Western District of Pennsylvania, do hereby
23 certify that the attached and foregoing sheets are true and correct copies of their originals, in the above entitled case, on file in my office, at the City of Pittsburgh.

Witness my hand and the seal of said Court, at the City of Pittsburgh, in said district, this 29th day of June, A. D. 1907.

[SEAL.] WM. T. LINDSEY, *Clerk.*

And afterwards to wit: on the sixteenth day of October, A. D. 1907, this cause being called for argument on the transcript of record from the District Court of the United States, for the Western District of Pennsylvania, before Hon. George M. Dallas, and Hon. George Gray, Circuit Judges and Hon. Joseph Cross, District Judge, and being argued by counsel for the respective parties and the court not being fully advised in the premises takes further time for consideration thereof:

And afterwards, to wit, on the twenty-seventh day of December, A. D. 1907, comes the parties aforesaid, by their counsel aforesaid, and the court now being fully advised in the premises renders the following opinion, to wit:

In the United States Circuit Court of Appeals for the Third Circuit. October Term, 1907.

No. 27.

HALL AND KAUL COMPANY, a Corporation Organized and Existing Under the Laws of the State of Pennsylvania, and a Resident of said State, Judgment Creditors, Appellant.

vs.

J. H. FRIDAY, GEORGE E. HARDIE, and CHARLES C. HENZEL, Residents of the State of Pennsylvania, Petitioning Creditors, and SOUTHSIDE TRUST COMPANY, Receiver, and THE MONONGAHELA CONSTRUCTION COMPANY, Bankrupt, Appellees.

Appeal from the District Court of the United States for the Western District of Pennsylvania.

21 Before Dallas and Gray, Circuit Judges, and Cross, District Judge.

GRAY, *Circuit Judge:*

This is a petition for review by the Hall and Kaul Company, a corporation of the State of Pennsylvania, asking that the order of the court below, adjudicating the Monongahela Construction Company, also a corporation of the State of Pennsylvania, to be a bankrupt, may be revised in matters of law under section 24 (b) of the bankruptcy Acts of 1898.

The question is one of jurisdiction, and was presented to the court below, as it is presented here, upon an agreed statement of facts, the material parts of which are as follows:

"A petition in voluntary bankruptcy having been filed in the above entitled case against the said Monongahela Construction Company, by J. H. Friday, et al, and answer thereto having been filed by Hall & Kaul Company, of Ridgeway, Pa., judgment creditors, objecting to the petition in bankruptcy of said company, for the following reasons:

"1st. That neither the petitioners nor the form of petition are within the requirements of the bankruptcy act of 1896.

"2nd. That the records do not show that said corporation has complied with the corporation laws of the State of Pennsylvania.

"3rd. That as a corporation, the nature of the business in which it is engaged is not such as will give this court jurisdiction under said bankrupt act of 1898 or its supplements.

"Now, therefore, in order that the questions raised by the petition and answer may be properly determined by this court, the following facts are admitted and agreed upon by the parties hereto:

"1. That the Monongahela Construction Company succeeded the Hill Construction Company, a corporation organized and existing under the laws of the State of Pennsylvania, having been incorporated on the 23rd day of May, 1905, and by resolution of the Board of Directors, the said Hill Construction Company changed its name

to the Monongahela Construction Company, on the 19th day of February, 1906, but that the certificate of such change was not recorded in the County of Allegheny, State of Pennsylvania, where its principal office is located, until February 9, 1907, ... days after the petition in this case was filed.

"2. That the purpose for which the said Hill Construction Company was organized and created, as set forth in its charter, was as follows: 'Corporation is formed for the purpose of constructing, erecting and repairing railroads, traction lines, duly incorporated, and streets, roads, buildings, structures, works or improvements of public or private use or utility.'

25 "3. That the business of the said Monongahela Construction Company has been making, constructing and erecting concrete arches, bridges, buildings, walls and other structures; also excavating, grading and ballasting of roadbeds and laying tracks for railroads. With the exception of the contract with the P. S. & N. R. R. for the making of roadbeds and laying of tracks from Detsch to Paine, Elk County, Pennsylvania, and the remodeling of a warehouse, in which concrete work is the chief item, all the other contracts at the time of the filing of the petition in this case, and the business in which the company has been engaged during the past year has been making and constructing arches, walls, and abutments, bridges, buildings, etc., out of concrete.

"4. That in carrying on its business it buys and combines together raw materials, such as cement, gravel and sand in the making of concrete, and supplies labor, machinery and appliances necessary for the proper carrying on of said business, of constructing and erecting concrete arches, piers, buildings and structures, and excavating therefor at such time and place, as its contracts call for. That it carries on no other manufacturing business except the above. The question whether this business is manufacturing or not is left to the determination of the court.

"5. That its principal place of business is in the City of Pittsburg, County of Allegheny, and State of Pennsylvania, where its office is located. It has no permanent shop or factory, but has a warehouse at 19th street, South Side."

The third section of the act of February 5th, 1903, amending the bankrupt act of 1898, provides:

"Any natural person, except a wage earner, or a person engaged chiefly in farming or the tillage of the soil, any unincorporated company, and any corporation engaged principally in manufacturing, trading, printing, publishing, mining or mercantile pursuits, owing debts to the amount of one thousand dollars or over, may be adjudged an involuntary bankrupt upon default or an impartial trial, and shall be subject to the provisions and entitled to the benefits of this act."

The sole question raised by the counsel for the petitioners is, whether the court below erred in adjudicating, as a bankrupt, the Monongahela Construction Company, as being a "corporation engaged principally in manufacturing." The court below decided that it was such a corporation, and that the motion of the execution

creditors, for dismissal of the petition in bankruptcy, must be denied and an adjudication in bankruptcy made. The conclusion at which the learned judge of the court below arrived, is strongly supported in the opinion which accompanies it. He is also in agreement
26 with the decisions of several of the district courts, and notably with that of the circuit court of appeals for the sixth circuit, in the recent case of *In re* First National Bank of Belle Fourche *et al.*, 152 F. R. 64. Notwithstanding the weight of such authorities, we must, as long as this section of the act remains unamended, in respect to the language here under consideration, and until the supreme court construes it otherwise, be governed by our own view of the proper interpretation of the Act.

The words "manufacture" and "manufacturing" seem to us to have a well ascertained and defined meaning. There is no confusion in the general concept conveyed by these words, as referring to the making of raw material or natural substances by hand, art or machinery, with more or less skill, into commodities for use. The leading lexicographers all agree as to this general signification. No special technical or legislative use of them, different from their general or popular use, has been suggested. It appears from the agreed statement of facts that the Monongahela Construction Company carried on no manufacturing business, unless the business of "making, constructing and erecting concrete arches, bridges, buildings, walls and other structures; also excavating, grading and ballasting of road beds and laying tracks for railroad," be such a business. The alleged bankrupt in this case, therefore, was a builder or constructor of concrete arches, bridges, buildings, walls and other structures. These were erected *in situ*, and when erected, were attached to and became part of the real estate. No one in ordinary parlance would ever think of saying that such a builder was a manufacturer of arches, houses, &c. It is only by a forced construction, founded on verbal refinements, that such a conclusion can be arrived at. It is true, that such a builder assembles and combines the raw materials of cement, sand and water, which are mixed with more or less skill with tools and appliances adapted for such purpose, and the composite thus formed being poured into moulds, gradually and by successive repetitions of the process, forms the arch, building or wall intended to be erected. We cannot see upon what possible ground a person or corporation engaged in this work is to be distinguished from one engaged in the erection of an arch, building or walls with other materials, such as stone, bricks and mortar, or how except arbitrarily, the one can be called a manufacturer and the other not.

It may be admitted, as argued by the court below, that if the materials entering into the formation of this concrete had been fashioned at a factory or other place, in the shape of blocks fit for building purposes, to be furnished to those engaged in erecting buildings, just as stone and bricks are furnished for that purpose, the producer of such blocks, so far as their production was concerned, would be engaged in manufacturing, in the ordinary accepta-
27 tion of that word, but this admission does not help us to the conclusion reached in the court below. There is no such

situation in the present case. The bankrupt was not engaged in such a business, which would have been as distinct from that of erecting the building, as the business of a brick maker would have been from that of the one who constructed the wall with the bricks; and certainly it would not be asserted that, if the supposititious concrete blocks had been furnished to the builder of the structure, both the producer of the blocks and the builder of the wall would have been engaged in manufacturing.

In construing the bankruptcy act, as in construing other acts of legislation, the words used must be given their ordinary and every day meaning, unless they are shown to have been used in some special or technical sense differing from such meaning. The construction given to the words referred to by the court below, seems to us to violate this rule, and to enlarge the class of persons or corporations to whom Congress intended to make applicable the provisions of the bankrupt act. In the light of the decisions, it must be admitted there is room for a different opinion, but we can only govern ourselves by the views which we ourselves entertain and have here expressed. We have examined the cases referred to on both sides, and after a full consideration, are of the opinion that the Monongahela Construction Company was not, under the agreed statement of facts, a "corporation engaged principally in manufacturing," and that therefore the court below was without jurisdiction to adjudicate it a bankrupt.

The decree of the court below is therefore reversed, with directions to dismiss the petition of the petitioning creditors.

In the United States Circuit Court of Appeals for the Third Circuit, October Term, 1907.

No. 27.

HALL AND KAUL COMPANY, Appellant,

vs.

J. H. FRIDAY, GEORGE E. HARDIE, and CHARLES C. HENZEL, Petitioning Creditors, and SOUTHSIDE TRUST COMPANY, Receivers, and THE MONONGAHELA CONSTRUCTION COMPANY, Bankrupt, Appellees.

28 Appeal from the District Court of the United States, for the Western District of Pennsylvania.

This cause came on to be heard on the transcript of record from the District Court of the United States, for the Western District of Pennsylvania, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed by this court that the decree of the said District Court in this cause, be, and the same is hereby reversed with costs.

And it is further ordered that this cause be remanded to the said District Court with directions to dismiss the petition of the petitioning creditors.

GEO. M. DALLAS,
Circuit Judge.

Philadelphia, December 31, 1907.

(Endorsed:) No. 27, October Term, 1907. U. S. Circuit Court of Appeals, Third Circuit. Hall and Kaul Company, appellant, *vs.* J. H. Friday, et al., appellees. Order reversing decree of District Court, etc. Entered and filed December 31, 1907.

29 UNITED STATES OF AMERICA, *set:*

I, William H. Merrick, Clerk of the United States Circuit Court of Appeals, for the Third Circuit, do hereby certify that the foregoing pages, from 1 to 28, inclusive, to contain a full, true, complete and faithful copy of the original transcript of record in the case of Hall and Kaul Company, Appellant, and J. H. Friday, George E. Hardie, and Charles C. Henzel, petitioning creditors, and Southside Trust Company, Receiver, and the Monongahela Construction Company, Bankrupt, appellees, on file and now remaining among the records of the said court in my office.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the said Court at Philadelphia this twentieth day of January, in the year of our Lord one thousand nine hundred and eight, and of the Independence of the United States the one hundred and thirty-second.

[Seal United States Circuit Court of Appeals, Third Circuit.]

WM. H. MERRICK,
Clerk U. S. Circuit Court of Appeals, Third Circuit.

30 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Third Circuit, Greeting:

Being informed that there is now pending before you a suit in which Hall & Kaul Company is appellant, and J. H. Friday, George E. Hardie, Charles C. Henzel, et al., are appellees, which suit was removed into the said Circuit Court of Appeals by virtue of an appeal from the District Court of the United States for the Western District of Pennsylvania, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme Court of the United States, do hereby command

31 you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 5th day of March, in the year of our Lord one thousand nine hundred and eight.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

32 [Endorsed:] File No. 21,003. Supreme Court of the United States. No. 600. October Term, 1907. J. H. Friday, et al., *vs.* Hall & Kaul Company. Writ of certiorari.

33 In the Supreme Court of the United States, October Term, 1907.

No. 600.

J. H. FRIDAY, GEORGE E. HARDIE, CHARLES C. HENZEL ET AL., Petitioners,
vs.
HALL & KAUL COMPANY, a Corporation.

It is hereby stipulated that the certified transcript of record filed in the Supreme Court of the United States with the petition for a writ of certiorari in the above entitled cause shall be taken as a return to the writ of certiorari issued by the Supreme Court of the United States in the said cause, and that a certified copy of this stipulation shall be sent by the Clerk of the United States Circuit Court of Appeals for the Third Circuit as his return to the said writ of certiorari.

(Signed) RICHARD A. FORD,
Of Counsel for the Petitioners.
(Signed) GEO. L. ROBERTS,
Of Counsel for the Respondents.

34 UNITED STATES OF AMERICA,
Eastern District of Pennsylvania,
Third Judicial Circuit, set:

I, William H. Merrick, Clerk of the United States Court of Appeals, for the Third Circuit, by virtue of the foregoing Writ of Certiorari and in obedience thereto do hereby certify to the Supreme Court of the United States the consent of the Counsel for the respective parties thereto annexed as my return to the said writ.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the said Court, at Philadelphia, this sixteenth day of March in the year of our Lord one thousand nine hundred and eight and of the Independence of the United States the one hundred and thirty-second.

[Seal of United States Circuit Court of Appeals.]

WM. H. MERRICK,
Clerk U. S. Circuit Court of Appeals, Third Circuit.

35 [Endorsed:] File No. 21,003. Supreme Court U. S. October Term, 1907. Term No. 600. J. H. Friday *et al.*, Petitioners, *vs.* Hall & Kaul Company. Writ of Certiorari and return. Filed March 17th, 1908.

IN THE

Supreme Court of the United States

No. 266 OCTOBER TERM, 1907.

J. H. FRIDAY, GEORGE E. HARDIE and CHARLES C. HENZEL, Residents of the State of Pennsylvania, Petitioning Creditors; SOUTH SIDE TRUST COMPANY, Receiver, and MONONGAHELA CONSTRUCTION COMPANY, Bankrupt,
Petitioners,

vs.

HALL & KAUL COMPANY, Corporation Organized and Existing under the Laws of the State of Pennsylvania, and a Resident of that State, Judgment Creditor, Respondent.

PETITION FOR WRIT OF CERTIORARI DIRECTED TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

RICHARD A. FORD,
Of Counsel for Petitioners.

Union Trust Building,
Washington, D. C.

Smith Bros. Co. Inc., Franklin Print, 412 Grant Street, Pittsburgh.

IN THE

Supreme Court of the United States

No. 600 OCTOBER TERM, A. D. 1907.

J. H. FRIDAY, GEORGE E. HARDIE and CHARLES C. HENZEL, Residents of the State of Pennsylvania, Petitioning Creditors; SOUTH SIDE TRUST COMPANY, Receiver, and MONONGAHELA CONSTRUCTION COMPANY, Bankrupt,
Petitioners,

vs.

HALL & KAUL COMPANY, a Corporation Organized and Existing under the Laws of the State of Pennsylvania, and a Resident of that State, Judgment Creditor,
Respondent.

PETITION FOR WRIT OF CERTIORARI DIRECTED TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, REQUIRING IT TO CERTIFY TO THE SUPREME COURT OF THE UNITED STATES FOR ITS REVISION AND DETERMINATION, THE PETITION OF HALL & KAUL COMPANY FOR REVIEW, IN BANKRUPTCY, OF THE ORDER OF THE DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA ADJUDICATING THE MONONGAHELA CONSTRUCTION COMPANY, A CORPORATION OF PENNSYLVANIA, BANKRUPT, LATELY DEPENDING IN SAID CIRCUIT COURT OF APPEALS.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioners respectfully represent:

(1) This cause involves a question purely of jurisdiction of the district courts of the United States sitting in bank-

ruptcy to adjudge certain corporations bankrupt as engaged principally in "manufacturing" within the intent and meaning of that word as it is used in the Act of February 5, 1903, Sec. 3, amending the Act of July 1, 1898, generally known as the National Bankruptcy Law, and raises a question of far reaching importance by reason of the fact that the decision of the Circuit Court of Appeals for the Third Circuit in this cause has resulted in a conflict of authority between two or more Circuit Courts of Appeal upon the same question, thereby seriously impairing the usefulness of said Act.

(2) On January 26, 1907, a creditors' petition was filed in the District Court of the United States for the Western District of Pennsylvania against the Monongahela Construction Company, a corporation of said State, alleging that it was a corporation engaged principally in manufacturing, and setting forth as an act of bankruptcy that on that day it had admitted in writing its inability to pay its debts. On February 7, 1907, the defendant filed its answer to said petition admitting the facts therein set forth, and its willingness to be adjudged bankrupt, and on February 15, 1907, the adjudication was made and the case referred to Wm. R. Blair, Esq., Referee in Bankruptcy.

On January 28, 1907, on application to the Referee, and upon certificate of the Judge's absence, a restraining order was issued against the Hall & Kaul Company and other execution creditors of the Monongahela Construction Company, commanding them to abstain from any and all interference by execution, sale, levy or in any other manner whatever with the property of the said Construction Company until the further order of this Court. On February 5, 1907, the said Hall & Kaul Company filed its answer alleging that the Monongahela Construction Company is not "engaged principally in manufacturing, and denying that it is engaged in any business provided under the National Bankruptcy Act of

1898, or any of the amendments or supplements thereto," and with said answer filed a motion to dismiss the petition in bankruptcy. On February 18, 1907, all parties consenting thereto, an order was made revoking the decree of adjudication and on the same day the counsel interested filed an agreed statement of facts setting forth, among other things, the purposes for which the Monongahela Construction Company was organized and the business in which the said Company was principally engaged, as follows:

> "That the business of said Monongahela Construction Company has been making, constructing and erecting concrete arches, buildings, bridges, walls and other structures, also excavating, grading, ballasting of road beds, and laying track for railroads. With the exception of the contract with the P. S. & N. R. R. for the making of a road bed and laying of track from Detsch to Payne, in Elk County, Pa., and the remodeling of a warehouse in which concrete work is the chief item, all the other contracts at the time of filing the petition in this case, and the business in which the company has been engaged during the past year has been making and constructing arches, walls, abutments, bridges, buildings, etc., out of concrete.
>
> That in carrying on its business it buys and combines together raw materials, such as cement, gravel and sand in the making of concrete, and supplies labor, machinery and appliances necessary for the proper carrying on of said business of constructing and erecting concrete arches, piers, buildings, and structures, and excavating therefor, at such times and places, as its contracts call for. That it carries on no other manufacturing business except the above. The question whether this business is manufacturing or not is left to the determination of the court."

On April 17, 1907, after the case had been duly argued upon said agreed statement of facts the District Court filed its opinion holding that the Monongahela Constructing Company is a corporation engaged principally in manufacturing, denying the motion of Hall & Kaul Company for the dismissal of the petition, and ordering an adjudication in bankruptcy, and that the matter be referred to the Referee. Subsequently, at a meeting of creditors, the South Side Trust Company of Pittsburgh, the Receiver, was duly elected and has qualified as Trustee of the bankrupt.

That the said Hall & Kraul Company thereupon, on April 29, 1907, filed its petition for review of said order of the District Court in accordance with Sec. 24 b of the Bankruptcy Act of 1898, and the petition having been allowed and the cause having been duly heard in the Circuit Court of Appeals for the Third Circuit, in an opinion handed down on December 27, 1907, the decision of the District Court was reversed, and that Court was held to be without jurisdiction to adjudge the Monongahela Construction Company bankrupt.

(3) Your petitioners represent that the sole question raised throughout the course of these proceedings is that of the jurisdiction of the District Court to adjudge a corporation principally engaged in "making, and constructing arches, walls, abutments, bridges, buildings, etc., out of concrete" bankrupt as a manufacturing corporation under the following section of said Act:

> "Any natural person, except a wage earner or a person engaged chiefly in farming or the tilling of the soil, any unincorporated company and any person engaged principally in manufacturing, trading, printing, publishing, mining or mercantile pursuits, owing debts to the amount of One thousand dollars, or over, may be adjudged an involuntary bankrupt upon default or an im-

partial trial, and shall be subject to the provisions and entitled to the benefits of this act."

Act Feb. 5, 1903, Ch. 487, Sec. 3, 32 St. at L., 797.

(4) That by reason of said decision of the Circuit Court of Appeals for the Third Circuit there is a conflict between two or more Circuit Courts of Appeal upon the same question. The learned judge of the Appellate Court in the opinion handed down in this case states

"The sole question raised by the counsel for the petitioners is, whether the court below erred in adjudicating as a bankrupt the Monongahela Construction Company, as being a 'corporation engaged principally in manufacturing.' The court below decided that it was such a corporation, and that the motion of the execution creditors, for dismissal of the petition in bankruptcy, must be denied and an adjudication in bankruptcy made. The conclusion at which the learned judge of the court below arrived, is strongly supported in the opinion which accompanies it. He is also in agreement with the decision of several of the district courts, and notably with that of the circuit court of appeals for the Eighth Circuit, in the recent case of *In re First National Bank of Belle Fourche, et al.*, 152 F. R., 64. Notwithstanding the weight of such authorities, we must, as long as this section of the act remains unamended, in respect to the language here under consideration, and until the supreme court construes it otherwise, be governed by our own view of the proper interpretation of the Act.

"The words 'manufacture' and 'manufacturing' seem to us to have a well ascertained and defined meaning. There is no confusion in the general concept conveyed by these words, as referring to the making of raw material or natural substances by hand, art or machinery,

with more or less skill, into commodities for use. The leading lexicographers all agree as to this general signification. No special technical or legislative use of them, different from their general or popular use, has been suggested. It appears from the agreed statement of facts that the Monongahela Construction Company carried on no manufacturing business, unless the business of 'making, constructing and erecting concrete arches, bridges, buildings, walls and other structures; also excavating, grading and ballasting of road beds and laying tracks for railroads,' be such a business. The alleged bankrupt in this case, therefore, was a builder or constructor of concrete arches, bridges, buildings, walls and other structures. These were erected *in situ* and when erected, were attached to and became part of the real estate. No one in ordinary parlance would ever think of saying that such a builder was a manufacturer of arches, houses, &c. It is only by forced construction, founded on verbal refinements, that such a conclusion can be arrived at. It is true that such a builder assembles and combines the raw materials of cement, sand, and water, which are mixed with more or less skill with tools and appliances adapted for such purpose, and the composite thus formed being poured into moulds, gradually and by successive repetitions of the process, forms the arch, building or wall intended to be erected. We cannot see upon what possible ground a person or corporation engaged in this work is to be distinguished from one engaged in the erection of an arch, building or walls with other materials, such as stone, bricks and mortar, or how, except arbitrarily, the one can be called a manufacturer and the other not.

"It may be admitted, as argued by the court below, that if the materials entering into the formation of this concrete had been fashioned at a factory or other place,

in the shape of blocks first for building purposes, to be furnished to those engaged in erecting buildings, just as stone and bricks are furnished for that purpose, the producer of such blocks, so far as their production was concerned, would be engaged in manufacturing, in the ordinary acceptation of that word, but this admission does not help us to the conclusion reached in the court below. There is no such situation in the present case. The bankrupt was not engaged in such a business, which would have been as distinct from that of erecting the building, as the business of a brick maker would have been from that of the one who constructed the wall with the bricks; and certainly it would not be asserted that, if the supposititious concrete blocks had been furnished to the builder of the structure, both the producer of the blocks and the builder of the wall would have been engaged in manufacturing.

"In construing the bankruptcy act, as in construing other acts of legislation, the words must be given their ordinary and every day meaning, unless they are shown to have been used in some special or technical sense differing from such meaning. The construction given to the words referred to by the court below, seem to us to violate this rule, and to enlarge the class of persons or corporations to whom Congress intended to make applicable the provisions of the bankruptcy act. In the light of the decisions, it must be admitted that there is room for a different opinion, but we can only govern ourselves by the views which we ourselves entertain and have expressed."

Directly opposed to said decision is that of the Circuit Court of Appeals for the Eighth Circuit in the case of *In re First National Bank of Belle Fourche et al.*, 152 F. R. 64

(cited in the foregoing opinion). Sanborn, J., in the course of the opinion in this case, says:

> "The pertinent averment of the petition for the adjudication was that the Widell Company 'is, and during all said time has been engaged in the business of manufacturing concrete arches and bridges, manufacturing and dressing stone and selling the same, and railroad and ditch contracting.' The word 'manufacturing' is a generic term of broad significance, advisedly used by Congress to include many species of corporations and its comprehensive meaning ought not to be whittled away by fine distinctions. Derivatively meaning making with the hand, its ordinary significance is producing a new article of use or ornament by the application of skill and labor to the raw materials of which it is composed. Pin makers, pen makers, shoe makers, furniture makers, lumber makers, steel makers, boot makers, rail makers, engine makers, cement makers, are undoubtedly engaged in manufacturing, and the cogency of the argument that a corporation which makes a pin is manufacturing, while one which makes a bridge is not, fails to appeal to our judgment with convincing force. The latter may make the cement, or the steel it uses in its structure. If so, it is engaged in manufacturing the cement or the steel, and, whether it makes them or not, it produces a new and useful article, a bridge, when by the application of skill and labor to the materials of which it is composed it constructs it.
>
> As usual in respect to every question which involves the construction or operation of the bankruptcy law, there is a conflict of authority. *Butt vs. C. F. MacNichol Const. Co.*, 140 Fed. 840, 72 C. C. A., 252; *In re Minnesota & A. Const. Co.*, 60 Pac. 881, 7 Ariz. 137; *In re Smith, 2 Lowell*, 69 Fed. Cas. No. 12,981;

In re Tontine Surety Co. (D. C.) 116 Fed. 401. But the more persuasive reasons and the weight of the decisions support the view, and our conclusion is, that a corporation principally engaged in constructing concrete arches and bridges and in dressing and selling stone is engaged in a manufacturing pursuit and subject to adjudication in bankruptcy upon an involuntary petition. *Columbia Iron Works vs. National Lead Co.* 127 Fed. 99, 102, 62 C. C. A. 99, 102, 64 L. R. A. 645; *In re Niagara Contracting Co.* (D. C.) 127 Fed. 782; *In re Marine Const. etc., C.*, 130 Fed. 446, 64 C. C. A., 648; *In re Matthews Consolidated Slate Co.*, 144 Fed. 737, 738, 75 C. C. A. 603; *In re Quincy Granite Quarries Co.*, (D. C.) 147 Fed. 279; *In re H. R. Leighton & Co.*, (D. C.) 147 Fed. 311, 313; *In re Troy Steam Laundering Co.*, (D. C.) 132 Fed. 266; *White Mountain Paper Co. vs. Morse & Co.*, 127 Fed. 643, 644, 62 C. C. A. 369, 370."

(5) Your petitioners represent that there is no uniformity of decision in the District and Circuit Courts of Appeal of the United States as to what corporations can be classed as principally engaged in manufacturing under the act of February 5, 1903, Ch. 487, Sec. 3, 32 Stat. at L. 797, and that the cases referred to by the learned judge of the Circuit Court of Appeals for the Eighth Circuit show a marked difference of opinion as to whether the words used in said section of the Bankruptcy Act to designate what corporations may be adjudged bankrupt are to be used in their generic sense and receive a liberal interpretation, or whether they are to be strictly construed; and that it is a matter not only of great moment to them but it is a matter of interest to all citizens that a uniform construction be given to said section of the bankruptcy act and that this Court determine whether or not a corporation engaged in the character of work such as the Monongahela

Construction Company was doing, to-wit, making and erecting bridges, piers, abutments, etc., out of concrete, may be adjudged bankrupt.

Wherefore, your petitioners, feeling aggrieved because of the decision of the Circuit Court of Appeals for the Third Circuit, pray that a writ of *certiorari* may be issued out of and under the seal of this court directed to the United States Circuit Court of Appeals for the Third Circuit, commanding said court to certify and send to this court a full and complete transcript of the record in all proceedings in said Circuit Court of Appeals in the case depending therein, entitled Hall & Kaul Company, a corporation organized and existing under the laws of the State of Pennsylvania, and a resident of said State, Judgment Creditors, vs. J. H. Friday, George E. Hardie and Charles C. Henzel, Residents of the State of Pennsylvania, Petitioning Creditors, and the South Side Trust Company, Receiver, and the Monongahela Construction Company, Bankrupt, No. 27 October Term, 1907, to the end that this case may be reviewed and determined by this Court as provided by law, and that the judgment of the said Circuit Court of Appeals in said case may be modified so as to deny the petition for review filed by the Hall & Kaul Company to that court, in bankruptcy, and your petitioners will ever pray.

RICHARD A. FORD,
of Counsel for Petitioners.

State of Pennsylvania,
County of Allegheny. } ss:

Before me, a Notary Public in and for said County, came Benjamin Page, President of the Southside Trust Company of Pittsburgh, one of the Petitioners herein, who, being duly sworn, deposes and says that he has read the foregoing petition and knows the contents thereof, and that the same is true to his knowledge and belief, except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

BENJAMIN PAGE.

Sworn to before me this 27th day of January, 1908.

A. H. MCNAMEE.

[SEAL] *Notary Public.*

My commission expires April 10, 1911.

I certify that I have examined the foregoing petition, and that in my opinion the petition is well founded as to matters of fact and as to matters of law, and that the case identified thereby is one warranting that the prayer of the petitioner should be granted by this Honorable Court.

RICHARD A. FORD,
Of Counsel for Petitioners.

THE SUPREME COURT OF THE UNITED STATES.

J. H. Friday, George E. Hardie and Charles C. Henzel, Residents of the State of Pennsylvania, Petitioning Creditors; South Side Trust Company, Receiver, and Monongahela Construction Company, Bankrupt,
Petitioners.

vs.

Hall & Kaul Company, a Corporation Organized and Existing under the Laws of the State of Pennsylvania, and a Resident of that State, Judgment Creditor,
Respondent.

Motion for Certiorari.

And now comes Benjamin Page, President of the Southside Trust Company of Pittsburgh, formerly the Receiver, later Trustee in Bankruptcy of the Monongahela Construction Company, Bankrupt, and moves this Honorable Court that it shall, by *certiorari* directed to the Honorable, the Judges of the United States Circuit Court of Appeals for the Third Circuit, require said Court to certify to this Court for its review and determination, a certain matter in said Circuit Court of Appeals lately pending, wherein the South Side Trust Co., above named, was one of the respondents and appellees, and the respondent above named was the appellant and petitioner, and to the end he now tenders herewith the petition with a certified copy of the entire record of said matter in said Circuit Court of Appeals.

Dated Washington, January 27th, A. D. 1908.

Richard A. Ford,
Of Counsel for Petitioners.

THE SUPREME COURT OF THE UNITED STATES.

J. H. Friday, George E. Hardie and Charles C. Henzel, Residents of the State of Pennsylvania, Petitioning Creditors; South Side Trust Company, Receiver, and Monongahela Construction Company, Bankrupt,
Petitioners.

vs.

Hall & Kaul Company, a Corporation Organized and Existing under the Laws of the State of Pennsylvania, and a Resident of that State, Judgment Creditor,
Respondent.

Notice of Motion.

Sir: You will please take notice that upon a certified copy of the record herein and upon the annexed petition of the Southside Trust Company of Pittsburgh, formerly Receiver, later Trustee in Bankruptcy of the Monongahela Construction Co., *et al.*, verified the 27th of January, 1908, I shall move the motion hereto annexed before the Supreme Court of the United States at the Capitol, in the City of Washington, in the District of Columbia, on Monday, the 24th day of February, 1908, or as soon thereafter as counsel

can be heard, and that I shall then and there move for such other and further relief in the premises as may be just.

Dated Washington, D. C., January 27th, 1908.

Yours, &.

RICHARD A. FORD,
Of Counsel for Petitioners,
Office and Post Office Address,
Union Trust Building,
Washington, D. C.

To GEORGE L. ROBERTS, Esq.,
Of Counsel for Respondent.
Office and Post Office Address,
No. 215 Water Street,
Pittsburgh, Pa.

THE SUPREME COURT OF THE UNITED STATES.

J. H. Friday, George E. Hardie and Charles C. Henzel, Residents of the State of Pennsylvania, Petitioning Creditors; South Side Trust Company, Receiver, and Monongahela Construction Company, Bankrupt,
Petitioners.

vs.

Hall & Kaul Company, a Corporation Organized and Existing under the Laws of the State of Pennsylvania, and a Resident of that State, Judgment Creditor,
Respondent.

Notice of Petition.

Sirs: You will please take notice that the South Side Trust Company, Receiver, later Trustee in Bankruptcy of the Monongahela Construction Company, Bankrupt, by Benjamin Page, President, is about to petition the Supreme Court of the United States for a writ of certiorari, directed to the United States Circuit Court of Appeals for the Third Circuit requiring said Court to certify and send to the Supreme Court of the United States for review, a full and complete transcript of the record of all the proceedings in said Circuit Court of Appeals for the Third Circuit in the case therein entitled "Hall and Kaul Company, a corporation organized and existing under the laws of the State of Pennsylvania, and a resident of said State, Judgment Creditors,

Appellant, vs. J. H. Friday, George E. Hardie and Charles C. Henzel, residents of the State of Pennsylvania, Petitioning Creditors, and the South Side Trust Company, Receiver, and the Monongahela Construction Company, Bankrupt, Appellees," to the end that said case may be reviewed and determined by the Supreme Court of the United States as provided by law, and that the decree, mandate and judgment of said Circuit Court of Appeals may be reversed in all respects and things, and the order of the District Court of the United States for the Western District of Pennsylvania, dated April 19th, 1907, be in all respects and things affirmed.

Dated Washington, D. C., January 27th, 1908.

RICHARD A. FORD,
Of Counsel for Petitioners.
Office and Post Office Address,
Union Trust Building,
Washington, D. C.

To GEORGE L. ROBERTS, ESQ.,
Of Counsel for Respondent.
Office and Post Office Address,
No. 215 Water Street,
Pittsburgh, Pa.

Service of the foregoing notices accepted this 3rd day of February, 1908. Also copy of petition and brief.

GEO. L. ROBERTS.
Of Counsel for Respondent.

IN THE

Supreme Court of the United States

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No. [illegible] OCTOBER TERM, 1907.

J. H. FRIDAY, GEORGE E. HARDIE and CHARLES C. HENZEL, Residents of the State of Pennsylvania, Petitioning Creditors; SOUTH SIDE TRUST COMPANY, Receiver, and MONONGAHELA CONSTRUCTION COMPANY, Bankrupt,
Petitioners,

vs.

HALL & KAUL COMPANY, Corporation Organized and Existing under the Laws of the State of Pennsylvania, and a Resident of that State,
Judgment Creditor, Respondent.

BRIEF OF PETITIONERS

UPON PETITION FOR WRIT OF CERTIORARI.

ALEXANDER J. BARRON,
RICHARD A. FORD,
Of Counsel for Petitioners.

Smith Bros. Co. Inc., Franklin Print, 412 Grant Street, Pittsburgh.

IN THE

Supreme Court of the United States

No. 600 OCTOBER TERM, 1907.

J. H. FRIDAY, GEORGE E. HARDIE and CHARLES C. HENZEL, Residents of the State of Pennsylvania, Petitioning Creditors; SOUTH SIDE TRUST COMPANY, Receiver, and MONONGAHELA CONSTRUCTION COMPANY, Bankrupt,
Petitioners,

vs.

HALL & KAUL COMPANY, Corporation Organized and Existing under the Laws of the State of Pennsylvania, and a Resident of that State,
Judgment Creditor, Respondent.

Brief in Behalf of Petitioners.

I. The petition for the writ of *certiorari* is the only proceeding that is left to the petitioners under the Act of July 1st, 1898, ch. 541, known as the National Bankruptcy Act, inasmuch as the case was heard by the Circuit Court of Appears upon a petition to superintend and revise in matter of law under Section 24b of said Act (U. S. Comp. St., 1901, page 3432), which is as follows:

> "The several circuit courts of appeal shall have jurisdiction in equity, either interlocutory or final, to superintend and revise in matter of law the proceedings of

the several inferior courts of bankruptcy within their jurisdiction. Such powers shall be exercised on due notice and petition by any party agreed."

Section 25d. of said Act provides:

> "Controversies may be certified to the Supreme Court of the United States from other courts of the United States and the former court may exercise jurisdiction thereof and issue writs of *certiorari* pursuant to the provisions of the United States laws now in force or such as may be hereafter enacted."

Under a reasonable construction of subdivision d. of Section 25, it has been held in a number of United States Supreme Court decisions, *certiorari* lies to decrees in revision:

Denver First National Bank vs. Klug, 186 U. S., 202;

Holden vs. Stratton, 191 U. S., 115, at 119;

Bryan vs. Bernheimer, 175 U. S., 724, S. C. 181, U. S. 188;

Mueller vs. Nugent, 180 U. S. 640, S. C. 184, U. S. 1;

Louisville Trust Co. vs. Cominger, 181 U. S. 620, S. C. 184, U. S. 18.

In *Holden vs. Stratton* (cited *supra*) it is said:

> "The distinction between steps in bankruptcy proceedings proper and controversies arising out of settlement of estates of bankrupts is recognized in Sections 23, 24 and 25, of the present Act and the provisions as to revision in matter of law and appeals were framed and must be construed in view of distinction (citing cases).

Section 6 of the Act of March 31, 1891, has no application, as that refers to cases carried to the Circuit Court of Appeals by appeal or writ of error, but in view of the terms of that act and of the nature of the writ, we have held that under a reasonable construction of subdivision d., Sec. 25, *certiorari* lies to decrees in revision. (*Bryan vs. Bernheimer,* 175 U. S. 724, S. C. 181 U. S. 188; *Mueller vs. Nugent,* 180, U. S. 640, S. C. 184 U. S. 1; *Louisville Trust Co. vs. Comingor,* 181 U. S. 620, S. C. 184 U. S. 18. In the case first cited, it is pointed out that the Circuit Court of Appeals treated the case before it on a petition for revision, though it had been carried there by appeal and we considered the decree as rendered in the exercise of the supervisory power. 181 U. S. 192, 193."

II. While the granting of a writ of *certiorari* is a matter of discretion for the court, it has been held that it will be granted where "the circumstances of the case satisfy the Supreme Court of the importance of the question involved, the necessity of avoiding conflict between two or more Courts of Appeal, or between Courts of Appeal and Courts of a State, or some matter affecting the interests of this nation in its internal or external relations."

Forsyth vs. Hammond, 166 U. S. 514;

American Construction Co. vs. Jacksonville, Tampa & Key West, 148 U. S. 372;

Lau Ow Bew vs. United States, 144 U. S. 47.

III. The writ is asked in the present case on the ground that there is, as appears from the opinion of the learned Judge of the Circuit Court of Appeals for the Third Circuit, (found at page 24 of the record), a conflict of authority between two or more Circuit Courts of Appeal, upon the ques-

tion whether or not a corporation engaged in building arches, piers, abutments, etc., from concrete is a corporation engaged principally in manufacturing, within the intent and meaning of Section 3 of the Act of February 5, 1903, amending the Act of July 1st, 1898, generally known as the National Bankruptcy Law, which provides:

> "Any natural person, except a wage earner or a person engaged chiefly in farming or the tillage of the soil, any unincorporated company and any ~~person~~ corporation engaged principally in manufacturing, trading, printing, publishing, mining or mercantile pursuits, owing debts to the amount of One thousand dollars, or over, may be adjudged an involuntary bankrupt upon default or an impartial trial, and shall be subject to the provisions and entitled to the benefits of this Act."

The decree of the Circuit Court of Appeals for the Third Circuit, in reversing the District Judge and holding that such a corporation can not be adjudged a bankrupt, squarely conflicts with that of the Circuit Court of Appeals for the Eighth Circuit (fully quoted in the accompanying petition) which held that such a corporation was principally engaged in manufacturing within the intent and meaning of said Act and could be adjudged a bankrupt. *In re First National Bank of Belle Gourche et al.*, 152 F. R. 64.

IV. There is at present, as shown by the decisions of the Circuit Courts of Appeal, and the District Courts, a marked difference of opinion as to whether the words used in the foregoing section of the Bankruptcy Act to designate the classes of corporations that may be adjudged bankrupt are to be strictly construed, or whether they are to be considered as generic words of comprehensive meaning. In the opinion in this case, the Court states:

"In construing the bankruptcy act, as in construing other acts of legislation, the words must be given their ordinary and every day meaning, unless they are shown to have been used in some special or technical sense differing from such meaning. The construction given to the words referred to by the Court below, seem to us to violate this rule, and to enlarge the class of persons or corporations to whom Congress intended to make applicable the provisions of the Bankrupt Act. In the light of the decisions, it must be admitted that there is room for a different opinion, but we can only govern ourselves by the views which we ourselves entertain and have expressed." (Rec., 27)

In re. First National Bank of Belle Fourche, 152 Fed. 64, it is said:

"The word 'manufacturing' is a generic term of broad significance, advisedly used by Congress to include many species of corporations and its comprehensive meaning ought not to be whittled away by fine distinctions. Derivatively meaning making with the hand, its ordinary significance is producing a new article of use or ornament by the application of skill and labor to the raw materials of which it is composed. Pin makers, pen makers, boot makers, rail makers, engine makers, cement makers, are undoubtedly engaged in manufacturing, and the cogency of the argument that a corporation which makes a pin is manufacturing, while one which makes a bridge is not, fails to appeal to our judgment with convincing force. The latter may make the cement, of the steel it uses in its structure. If so, it is engaged in manufacturing the cement or the steel, and, whether it makes them or not, it produces a new and useful article, a bridge, when by the application of skill and labor to the materials of which it is composed it constructs it.

As usual in respect to every question which involves the construction or operation of the bankruptcy law, there is a conflict of authority * * * But the more persuasive reasons and the weight of the decisions support the view, and our conclusion is that a corporation principally engaged in constructing concrete arches and bridges, and in dressing and selling stone is subject to adjudication in bankruptcy upon an involuntary petition."

In re White Mountain Paper Company vs. Morris (C. C. A.), 127 Fed. Rep 180, affirmed in 127 Fed. 643, 646, Putnam, J., said:

"Statutes of this general class are not construed in a literal or narrow way, but, like customs legislation, they are held as addressing themselves to the general purpose for which they were enacted. This, in this case, is of a commercial business character. Therefore, clearly, the expressions of the statute under consideration are to be looked at from that point of view. Whether or not one has become engaged in a particular business would, of course, be differently determined under various statutes in accordance with the context and the peculiar object of each. For example, one could hardly be said to be engaged in any business requiring the taking out of a special license under the internal revenue laws of the United States until he was fully equipped therefor. Also one could not be held to be engaged in an illegal liquor traffic, so as to render himself subject to criminal proceedings, until he had actually commenced sales, except where there are some express statutory provisions applying to earlier stages of the undertaking. But the question here is whether, under this particular statute, this corporation had become 'engaged principally in manufacturing,' as that expression commends itself to the common understanding of those elements in the community to which statutes in bankruptcy are addressd."

In the case of *In re Matthews Consolidated Slate Company, C. C. A.*, 144 Fed. 721, at 144 Fed. 726, it is said by the learned Referee:

> "In the absence of a final decision by the Supreme Court of the United States, it is useless to attempt to reconcile the various conflicting decisions of the Courts under this provision of the law. That they have adopted an altogether too narrow and limited construction may be apparent if consideration is had of the origin and development of the language of the present 'Torrey Bill.'"

In addition to the conflict in the Circuit Courts of Appeal as to whether or not a company engaged in making and constructing concrete arches, bridges and abutments is a manufacturing company, in analogous cases it has been held that a corporation chartered

> "to construct and repair vessels of all kinds, carry on a general ship building and ship repair business, construct and operate a marine dry-dock in connection therewith, and also the building of steel structural work of all kinds, is a manufacturing corporation." *Columbia Iron Works vs. National Lead Company* (C. C. A.) 127 Fed. 99.

while a corporation engaged in the business of building bridges, wharves and bulkheads, and driving piles, is not. *Butt vs. C. F. MacNichol Const. Company*, C. C. A. 140 Fed. 840.

Wherefore your petitioners pray that your Honors may issue the writ of *certiorari* in the present case in order that a uniform construction to the said section of the Bank-

ruptcy Act may be obtained and that a conflict of authority between two Circuit Courts of Appeal upon the question as to whether or not a company engaged in making and erecting bridges, abutments, piers, etc., out of concrete is principally engaged in manufacturing pursuits, may be avoided.

ALEXANDER J. BARRON,

RICHARD A. FORD,

Of Counsel for Petitioners.

IN THE

Supreme Court of the United States

No. 68 OCTOBER TERM, 1909.

J. H. FRIDAY, GEORGE E. HARDIE and CHARLES C. HENZEL, Residents of the State of Pennsylvania, Petitioning Creditors; SOUTH SIDE TRUST COMPANY, Receiver, and MONONGAHELA CONSTRUCTION COMPANY, Bankrupt, Appellants,

vs.

HALL AND KAUL COMPANY, a Corporation Organized and Existing under the Laws of the State of Pennsylvania, and a Resident of said State, Judgment Creditor,

Appellee.

Brief and Argument of Appellants.

ALEXANDER J. BARRON,
RICHARD A. FORD,
Of Counsel for Appellants.

DARRITT PRINTING CO., 305 4TH AVE., PITTSBURGH, PA.

IN THE

Supreme Court of the United States

No. 68 OCTOBER TERM, 1909.

J. H. FRIDAY, GEORGE E. HARDEI and CHARLES C. HENZEL, Residents of the State of Pennsylvania, Petitioning Creditors; SOUTH SIDE TRUST COMPANY, Receiver, and MONONGAHELA CONSTRUCTION COMPANY, Bankrupt, Appellants,

vs.

HALL AND KAUL COMPANY, a Corporation Organized and Existing under the Laws of the State of Pennsylvania, and a Resident of said State, Judgment Creditor, Appellee.

STATEMENT OF THE CASE.

This question arises upon a writ of certiorari to the United States Circuit Court of Appeals, for the Third Circuit, to review the decision of that Court in reversing the decree of the District Court of the United States for the Western District of Pennsylvania adjudging the Monongahela Construction Company, a corporation of the State of Pennsylvania, a bankrupt.

On January 26, 1907, a creditor's petition was filed

in the District Court of the United States for the Western District of Pennsylvania, at No. 3480 In Bankruptcy, against the Monongahela Construction Company, alleging that it was a corporation engaged *principally in manufacturing*, and setting forth as an act of bankruptcy that on that day it had admitted in writing its inability to pay its debts (page 3 Record). On February 7, 1907, the defendant filed its answer to said petition admitting the facts therein set forth, and its willingness to be adjudged a bankrupt, and on February 15, 1907, the adjudication was made and the case referred to Wm. R. Blair, Esq., Referee in Bankruptcy.

On January 28, 1907, on application to the referee, the clerk having certified that the judge was absent from the District, a restraining order was issued against the Hall & Kaul Company and other execution creditors of the Monongahela Construction Company, commanding them to abstain from all interference by execution, sale, levy or in any other manner whatever with the property of the said Construction Company until further order of the Court. On February 5, 1907, the said Hall & Kaul Co. filed its answer, alleging that the Monongahela Construction Company is "not engaged principally in manufacturing, and denying that it is engaged in any business provided under the National Bankruptcy Act of 1898, or any of the amendments or supplements thereto," and with said answer filed a motion to dismiss the petition in bankruptcy. On February 18, 1907, all parties consenting thereto, an order was made revoking the decree of adjudication and on the same day the counsel interested filed an agreed statement of facts

(page 7. Record) setting forth, among other things, the purposes for which the Monongahela Construction Company was organized and the business in which the said Company was principally engaged, as follows:

> "That the business of the said Monongahela Construction Company has been making, constructing and erecting concrete arches, bridges, buildings, walls and other structures; also excavating, grading, ballasting of road beds, and laying track for railroads. With the exception of the contract with the P. S. & N. R. R. for the making of road bed and laying of track from Detsch to Payne, Elk County, Pa., and the remodeling of a warehouse in which concrete work is the chief item, all the other contracts at the time of filing the petition in this case, and the business in which the company has been engaged during the past year has been making and constructing arches, walls, abutments, bridges, buildings, etc., *out of concrete*.
>
> "That in carrying on its business it buys and combines together raw materials, such as cement, gravel and sand in the making of concrete, and supplies labor, machinery and appliances necessary for the proper carrying on of said business of constructing and erecting concrete arches, piers, buildings, and structures, and excavating therefor, at such times and places, as its contracts call for. That it carries on no other manufacturing business except the above. The question whether this business is manufacturing or not is left to the determination of the Court."
>
> (The italics are ours.)

On April 17, 1907, after the case had been argued upon said agreed statement of facts, the District Court filed its opinion (pages 9-13 Record) holding that the Monongahela Construction Company *is* a corporation en-

gaged *principally in manufacturing*, denying the motion of Hall & Kaul Company for the dismissal of the petition, and adjudicating the company bankrupt. The case was thereupon referred to the Referee, and at a meeting of creditors, the South Side Trust Company of Pittsburgh, the Receiver, was duly elected and has qualified as Trustee of the bankrupt, and has been actively engaged in the performance of its trust.

Hall & Kaul Company, the execution creditor, thereupon filed its petition for review of said order of the District Court in accordance with Sec. 24b of the Bankruptcy Act of 1898, and the petition having been allowed and the cause having been heard in the Circuit Court of Appeals for the Third Circuit, in an opinion filed December 27, 1907 (page 21, Record) the decision of the District Court was reversed, and that Court was held to be without jurisdiction to adjudge the Monongahela Construction Company bankrupt, the appellate court holding the said company was not a corporation engaged principally in manufacturing. A petition for a writ of certiorari to review the decision of the Circuit Court of Appeals because of a conflict of opinion by two Circuit Courts of Appeal upon the same question, was thereupon filed in this Court, on February 3, 1908, and the writ having been granted was returned March 17, 1908.

THE QUESTION INVOLVED.

The sole question raised throughout the course of the proceedings is that of the jurisdiction of the United States District Court to adjudicate the Monongahela Construction Company, a bankrupt, it being a corporation engaged principally in making and constructing arches, walls, abutments, buildings, etc., out of concrete. The provision in the Bankruptcy law applicable thereto is section 3 of the Act of Congress of February 5, 1903, 32 St. at L. 797, (amending section 4b of the Act of July 1, 1898, 30 St. at L. 547) which is as follows:

> "Any natural person, except a wage earner or a person engaged chiefly in farming or the tilling of the soil, any unincorporated company and any person engaged principally in manufacturing, trading, printing, publishing, mining or mercantile pursuits, owing debts to the amount of One thousand dollars or over, may be adjudged an involuntary bankrupt upon default or an impartial trial, and shall be subject to the provisions and entitled to the benefits of this act."

ASSIGNMENTS OF ERROR.

First. The Circuit Court of Appeals for the Third Circuit erred in holding that the Monongahela Construction Company was not a corporation engaged principally in manufacturing and that, therefore, the court below was without jurisdiction to adjudicate it a bankrupt.

Second. The Circuit Court of Appeals for the Third Circuit erred in sustaining the appeal of Hall & Kaul Company for the reason that the Monongahela Construction Company is a corporation engaged principally in manufacturing.

Third. The Circuit Court of Appeals for the Third Circuit erred in reversing the decree of the District Court, with costs, and in directing it to dismiss the petition of the petitioning creditors.

ARGUMENT.

The specifications of error bring before this Court for review, the decree of the Circuit Court of Appeals for the Third Circuit, reversing the decree of the District Court adjudicating the Monongahela Construction Company a bankrupt, on the ground that it is not a corporation engaged principally in manufacturing within the intent and meaning of these words as used in the Bankruptcy Act of 1898, section 4b, and its amendment the Act of February 5, 1903, section 3, wherein are designated those persons who may be adjudged involuntary bankrupts and subject to the provisions and entitled to the benefits of said Act.

I.

THE NATURE OF THE COMPANY'S BUSINESS WAS ESSENTIALLY MANUFACTURING.

The agreed statement of facts, at page 8 of the record, shows that although the company, to whose charter rights the Monongahela Construction Company succeeded, was incorporated under the laws of the State of Pennsylvania for the purpose of "constructing, erecting and repairing railroads, traction lines duly incorporated, streets, roads, buildings, structures, works or improvements of public or private use or utility," in point of fact the company did not follow out the lines of business contemplated by its charter, but had for a period of one year prior to the institution of the bankruptcy proceedings been "principally engaged in the making of walls, piers, bridges, abutments, etc., of concrete."

A corporation engaged in the erection of concrete walls, piers, abutments, bridges, etc., is, from the very nature of its work, of necessity, principally engaged in manufacturing.

This company was one of the greatly increasing number of those which have turned their attention to the making of solid structures from the substance known as concrete. While the material has been in use from early times, it has only been within recent years that its practical efficiency in connection with steel in the product known as reinforced concrete has been demonstrated to be a new and valuable asset in the erection of structures where a heavy weight and strain must be sustained at the same time.

In the manufacture of concrete, cement, gravel, sand and water are usually poured into machines known as concrete mixers, run by steam, the revolutions of which cause a combination of the materials to form; the liquid mass is poured into wooden forms or molds of the character and size of the block, wall, arch, etc., to be erected, on the location therefor, and it is then compressed before hardening. It is then left to harden in place, after which the mold or form is removed, leaving the completed structure. *In order to serve any practical purpose whatever, the stone known as concrete, a substance entirely different from any of its ingredients, must of necessity take the shape of the structure contemplated while it is in process of being made or manufactured.*

That this process is manufacturing, is very clearly stated in the opinion of the learned Judge of the District

Court (pages 9-12 of the record.) After describing the character of the work done by the company, he says:

> "Thus by far the greater part of its work consists in the proper mingling of the various constituents of the concrete, making it of the proper consistency, and then before it hardens, pouring it in place in the mould provided, and thus the complete structure is but a large piece of concrete of the proper size and form and in the desired location. This, admittedly, is the principal business conducted by this Construction Company for some time past. Is that business, then, one of manufacture?
>
> "Admittedly, if the concrete were made at some point devoted entirely or principally to that business and made in the shape of blocks, and, after hardening, held there for sale, and transported upon sale to any point where their use was sought, the making of such block would be a work of manufacture. But the contention here is that because the concrete is made on the ground, attached to the soil before hardening, and when complete constitutes a permanent structure, which cannot be moved without destruction, such is not a work of manufacture.
>
> "It is difficult to see why the place where a thing is made should make any difference as to the character of the work done in making it, although it is to be admitted that most of the things that are spoken of as manufactured are articles which are capable of being transported from place to place and used when and as desired, and, in many instances, over and over again in different localities. This fact, however, does not militate against the actual character of the work in building up these concrete structures. The concrete must be first made, and that, ***after making, it is used before it***

becomes solidified and hardened in the place where it is to be finally left, and there put to harden, rather than being manufactured in one place and transported to another for use, should not, to my mind, change the character of the work.

"It is said, again, that the process used by this company is very similar to that of the ordinary contractor in mixing and using mortar and plaster in the erection of a building; but it must be remembered that in that case the mortar and plaster constitute but a small portion of the completed structure and are mere incidents therein, while in this case the concrete is the whole of the structure, for the finished structure consists of nothing else, so that it is not only the principal work, but the entire work in the conduct of this business.

"Undoubtedly there are forms of bridge building in which those engaged actually perform no manufacturing labor, but are content simply with assembling and putting together the material which has been prepared by others elsewhere and transported to the ground; but in this concrete work, the labor is not of that character, but, as we have seen, consists first, and principally, in the making of the concrete itself, and then placing it, while in an unfinished condition, in the mold of the structure desired.

"It may be admitted that in ordinary parlance we speak of the erection, not the manufacture of a bridge or arch or other similar structure, but that term probably came into use because of the fact that ordinarily the parts of bridges as formerly constructed were made elsewhere and simply erected upon the desired location, and at that time the concrete structure was unknown. And even if it be admitted here that the actual putting of the concrete

into place is an erection rather than a manufacture, yet that is not sufficient to deprive this Company of the appellation of a manufacturing company, for the making of the concrete prior to putting it into place is a large and important, and indeed, principal part of its work, and that must, in every sense of the term, be conceded to be a manufacture."

(The italics are ours.)

The opinion of the District Court is in harmony with the decision of the Circuit Court of Appeals for the Eighth Circuit, in In re First. Nat. Bank of Belle Fourche et al., 152 Fed. 64, in which certain creditors petitioned to revise in matter of law, the decision of the District Court, over-ruling their motion to vacate the order adjudicating the Widell-Finley Company, a corporation, bankrupt, on the ground that the creditors' petition alleged that the Widell Company "is, and during all said time has been, engaged in the business of manufacturing concrete arches and bridges, manufacturing and dressing stone and selling the same, and railroad and ditch contracting." Sanborn, Circuit Judge, speaking for the court, says:

"The word 'manufacturing' is a generic term of broad significance, advisedly used by Congress to include many species of corporations, and its comprehensive meaning ought not to be whittled away by fine distinctions. Derivatively meaning making with the hand, its ordinary significance is producing a new article of use or ornament by the application of skill and labor to the raw materials of which it is composed. Pin makers, pen makers, shoe makers, furniture makers, lumber makers, steel makers, boot makers, rail makers, engine makers, cement makers, are undoubtedly engaged in man-

ufacturing, and the cogency of the argument that a corporation which makes a pin is manufacturing, while one which makes a bridge is not, fails to appeal to our judgment with convincing force. The latter may make the cement or the steel it uses in its structure. If so, it is engaged in manufacturing the cement or the steel, and, whether it makes them or not, it produces a new and useful article, a bridge, when by the application of skill and labor to the materials of which it is composed, it constructs it.

"As usual, in respect to every question which involves the construction or operation of the bankruptcy law, there is a conflict of authority. Butt vs. C. F. MacNichol Const. Co., 140 Fed. 840, 72 C. C. A. 252; In re Minnesota & A. Const. Co., 60 Pac. 881, 7 Ariz. 137; In re Smith, 2 Lowell, 69, Fed. Case No. 12,981; In re Tontine Surety Co., (D. C.) 116 Fed. 401. But the more persuasive reasons, and the weight of the decisions support the view, and our conclusion is, that a corporation principally engaged in constructing concrete arches and bridges and in dressing and selling stone is engaged in a manufacturing pursuit and subject to adjudication in bankruptcy upon an involuntary petition. Columbia Iron Works v. National Lead Co., 127 Fed. 99, 102, 62 C. C. A., 99, 102, 64 L. R. A. 645; In re Niagara Contracting Co. (D. C.) 127 Fed. 782; In re Marine Const., etc. Co. 130 Fed. 446, 64 C. C. A. 648; In re Matthews Consolidated Slate Co., 144 Fed. 737, 738, 75 C. C. A., 603; In re Quincy Granite Quarries Co. (D. C.) 147 Fed. 279; In re H. R. Leighton & Co. (D. C.) 147 Fed. 311, 313; In re Troy Steam Laundering Co. (D. C.) 132 Fed. 266; White Mountain Paper Co. v. Morse & Co., 127 Fed. 643, 644; 62 C. C. A. 369, 370.

"The concession is freely made that a demurrer or an objection to evidence before the adjudication, upon the general ground that the petition for it did not contain a clear averment that the corporation was principally engaged in manufacturing concrete arches and bridges and dressing stone, would have been well taken. But if *either* of them had been made and sustained, the petition would have been immediately amendable."

(The italics are ours.)

Both these opinions go to the root of the question and in recognizing the fact that concrete is a manufactured product accord with the scientific works upon the subject, and properly apply to such a corporation the term *manufacturing*, as it is defined by the courts, in standard dictionaries, and as it is commonly understood. In the words of a learned district judge (In re Church Construction Co. 157 Fed. 298) "the most philosophical definition of 'manufacture' is the language of Justice Brown in Tidewater Oil Co. vs. U. S. 171 U. S. 216, viz:

"The primary meaning of the word 'manufacture' is something made by hand, as distinguished from a natural growth; but as machinery has largely supplanted this primitive method, the word is now ordinarily used to denote an article upon the material of which labor has been expended to make the finished product. Ordinarily, the article so manufactured takes a different form, or at least subserves a different purpose from the original materials; and usually it is given a different name. Raw materials may be and often are subjected to successive processes of manufacture, each one of which is complete in itself, but several of which may be required to make the final product. Thus, logs

are first manufactured into boards, planks, joists, scantlings, etc., and then by entirely different processes are fashioned into boxes, furniture, doors, window sashes, trimmings and the thousand and one articles manufactured wholly or in part of wood. The steel spring of a watch is made ultimately from iron ore, but by a large number of processes or transformations, each successive step in which is a distinct process of manufacture, and for which the article so manufactured receives a different name."

"Manufacture is transformation—the fashioning of raw materials into a change of form for use."

Justice Lamar, in Kidd vs. Pearson, 128 U. S 1, 20.

This definition is generally adopted by the lexicographers:

"MANUFACTURE:—To make or fabricate raw materials by hand, art or machinery and work into forms convenient for use, and when used as a noun, *anything* made from raw materials by hand or machinery or art.

"MANUFACTURING CORPORATION:—A corporation engaged in the production of some *article, thing or object* by skill or labor out of raw material or from matter which has already been subjected to artificial forces or to which something has been added to change its natural condition."—Bouvier.

"MANUFACTURE—Making an article either by hand or by machinery, into a new form capable of being used in ordinary life. In some instances it may refer to the process performed upon what is found in a natural state; in others, to a subsequent process."—Anderson's Dictionary of Law.

"The meaning of manufacturer has expanded as workmanship and art have advanced; so that now nearly all artificial products of human industry, nearly all such materials as have acquired changed conditions as new and specific combinations, whether from the direct action of the human hand, from chemical processes devised and directed by human skill, or by the use of machinery, are now commonly designated as 'manufactured.' Making flour from wheat is 'manufacturing.'"—Carlin vs. Western Assurance Co., 57 Md. 526. Anderson.

"MANUFACTURE—One who is engaged in the business of working raw materials into wares suitable for use; who gives new shapes, new qualities, new combinations to matter which has already gone through some artificial process."—Words and Phrases, Vol. 5, 4347.

"MANUFACTURE: (1) The operation of making wares or *any other products* by hand, by machinery, or by other agency.

(2) *Anything* made from raw material by the hand, by machinery or by art, as clothes, iron utensils, shoes, machinery, saddlery, etc.

"MANUFACTURE: (1) To make wares *or other products* by hand, by machinery or by any other agency as to manufacture cloth, nails, glass, etc.

(2) To work, as raw or partly wrought materials, into suitable forms for use—as, to manufacture wool, cotton, silk or iron. Webster (1901.)

MANUFACTURE. (L. manus, the hand, and facio, factus, to make).

(1) The *process* of making *anything* by art or of reducing materials *into a form* fit for use by

the hand or by machinery, as an establishment for the manufacture of cloth.

(2) *Anything* made or manufactured by hand or manual dexterity or by machinery.

"MANUFACTURE—(1) To form by manufacture or workmanship or by the hand or by machinery, to make by art and labor, as to manufacture cloth.

(2) To use or work up in manufactures. "We manufacture our wool." —Worcester.

(The italics are ours.)

That the process of making a concrete wall, arch, pier, etc., is also deemed manufacturing by those who are most thoroughly acquainted with it, as well as being embraced in the above definitions, appears from the following standard works and authorities on the substance known as Concrete.

"CONCRETE—An artificial stone made by mixing cement or some similar material, which after mixing with water will set and harden so as to adhere to inert material, and an aggregate composed of hard inert particles of varying size."

Taylor & Thompson, Treatise on Cement, Chap. I.

"CONCRETE may well be defined as a hard stone-like mass resulting from the mixture of aggregates of various nature and size with a cementatious substance possessing sufficient hydraulicity to become thoroughly indurated by the addition of water. It will, therefore, appear that there is a wide range of variance as to the bonding material, as to the aggregate, as to the preparation or manip-

ulation of the mass, as to the methods of condensation and curing, as to form, size and shape of the resulting construction. The general theory of concrete involves the thorough coating of the larger particles of the aggregate (i. e., the sand, gravel, stone or cinders), with sand or cement mortar so that all are thoroughly bounded together by the crystals formed in the course of the chemical action resulting from the hydration of the cement. It is therefore apparent that cement is the vital element in the production of concrete; that the quantity of water and the time and method of its application are of importance, and the qualities of the concrete are largely governed by the character of the aggregate, and by its quality as related to the cement, and also by the relative quantities of the different sizes and kinds of aggregate as related to each other. The mechanical factors of manipulation in mixing, of methods of depositing and compacting, and of maintaining proper conditions to secure thorough crystallization of the final set are not of less value."

H. H. Rice, in Chap. I, "Concrete," in Concrete Block Manufacture.

"REINFORCED CONCRETE is a most attractive mode of construction theoretically and splendid results may be obtained from laboratory tests. But it is so variable a quantity and so susceptible of tribulations in its handling that it is the most unsafe medium of construction known. *All other materials are completed and can be subjected to tests and are to a degree tested in handling before being brought on a building, while reinforced concrete can only be tested after the structure is completed when it is usually too late to remedy the defect.*"

John Knox Taylor, Supervising Architect. Treasury Department, in Stone Magazine, Feb. 1, 1909, pg. 403.

(The italics are ours.)

II.

THE BANKRUPTCY ACT IS NOT LIMITED TO THOSE MERELY ENGAGED IN MANUFACTURING COMMODITIES.

The learned judge of the Appellate Court in his opinion, (page 23, record), while acknowledging the strength of the opinion of the learned judge of the Court below, and the weight of the authorities agreeing with him, says:

> "The words 'manufacture' and 'manufacturing' seems to us to have a well ascertained and defined meaning. There is no confusion in the general concept conveyed by these words, as referring to the making of raw material or natural substances by hand, art or machinery, with more or less skill, into commodities for use."

He then argues that because this company constructed its arches, bridges and other structures from concrete, "in situ," and were attached to the real estate, that no one would think, in ordinary parlance, of saying that such a builder was a manufacturer of arches, houses, etc., and after describing generally the process employed, says:

> "We cannot see upon what possible ground a person or corporation engaged in this work is to be distinguished from one engaged in the erection of an arch, building or walls with other materials,

such as stone, bricks and mortar, or how except arbitrarily, the one can be called a manufacturer and the other not."

It is submitted that the learned judge not only is inaccurate in his definition of the terms used, but fails to see that the process described is as clearly manufacturing as is the making of the steel girders of a bridge, the mantels of a house or the bricks in a wall.

That the concrete when manufactured takes the shape of the wall or arch designed to be erected does not alter the fact that it is manufactured; nor does the fact that those who are engaged in this kind of work are engaged in a species of building erection alter the nature of their industry, which is separate and distinct from that of ordinary building erection. The difference between the maker of the concrete arch and the building contractor, or bricklayer is this: the former is principally engaged in *making* or *manufacturing* the product he is under contract to erect, construct, deliver or sell, the *latter merely puts together* that which others have already made.

And the learned judge virtually admits this to be the case when he says:

"It may be admitted, as argued by the court below, that if the materials entering into the formation of this concrete had been fashioned at a factory or other place, in the shape of blocks fit for building purposes, to be furnished to those engaged in erecting buildings, just as stone and bricks are furnished for that purpose, the producer of such blocks, so far as their production was con-

cerned, would be engaged in manufacturing, in the ordinary acceptation of that word."

It is submitted that the error of the learned judge lies in his confining the definition of the word "manufacture," to commodities. None of the definitions limit the term to chattels or things that can be transferred from place to place and the manufactured "article" or "commodity" is but one form of the manufactured product. The bankruptcy act does not state that persons engaged principally in *manufacturing articles* may be adjudged bankrupt, but those engaged principally in manufacturing. That the manufactured product is erected *in situ* or attached to the soil and can serve no useful purpose when removed, does not alter the nature of the business of those engaged in making it. Of what use are bricks, mantels, steel girders, or any of the innumerable parts of structures when once they are detached from that for which they were made? How much more readily transported and how much more useful is a derailed engine or steel car, or a steamship out of water, than a concrete pier detached from its foundation?

> "One who makes something for profit is a manufacturer of that something, and it makes no difference whether a thing so made or manufactured is affixed to the realty or a part of the realty, or a mere chattel. The same argument that concludes by finding the making or building of a house not a manufacture of the house because the same is a portion of the real estate, which certainly was not made or manufactured by man, would take away the name of manufacturer from one who made, by building in place the details of the house, e. g., mantel-pieces, or the like."

Hough, J: In re Church Const. Co. (D. C.) 157 Fed. 298.
In re Rutland Realty Co. (D. C.) 157 Fed. 296.

III.

CONSTRUCTION COMPANIES ARE NOT NECESSARILY EXCLUDED FROM THE OPERATION OF THE BANKRUPTCY ACT.

Even if the business of the Monongahela Construction Company had not been unlike that of the ordinary contracting or construction company, it would not necessarily be excluded from the benefits of the act. The definition of the term "construct" recognizes it to be a **kind of manufacture.** CONSTRUCT: "To put together the constituent parts of anything; * * * to form, to fabricate and to make." (Webster.) The definitions of "manufacture" (supra) are that it is "to make or fabricate anything for use." "Construct" and "manufacture" **are synonomous with the word "make" in all the standard dictionaries.**

In 1872, the then District Judge (later Mr. Justice) Blatchford, In re Garrison, Fed. Cases 5254, 5 Benedict, 430, 7 Nat. Bank Reg. 287, held that a stairbuilder who constructed stairs in place was none the less a merchant or tradesman, because he was also a manufacturer of the stairs. Similarly, under the Act of 1898, the following companies have been held to be engaged in manufacturing:

> "A corporation chartered to construct and repair vessels, carry on a general shipbuilding and ship repairing business and operate a marine dry

dock, also the business of steel structural work, Columbia Iron Works & Lead Co., C.C.A. 127 Fed. 99; building houses and bridges, In re Niagara Contracting Co. (D. C.) 127 Fed. 782. In re Church Construction Co. 157 Fed. 298; a shipbuilding corporation, In re Marine Construction Co., 130 Fed. 446."

The following decisions of the state courts are also instructive:

An asphalt paving company authorized to do a general contracting business in reference to pavements, roofs, floors, etc., and to manufacture and prepare asphalt for use in such business, was held to be a manufacturing corporation, and as such exempt from paying the tax under a state statute exempting such corporations:

> "The relator, in the year 1898, used all the asphaltum manufactured by it in connection with the construction of streets or floors under contract made by it for such construction, and it did not sell any of its product so manufactured to others, except as stated. Although the combination must be used before it has become hardened, there is no reason why it could not be made to order and sold wherever it could be quickly delivered. Many articles upon the market require immediate delivery after their manufacture or they will become worthless. * * * That the making of paving bricks is manufacture will not be gainsaid. If the relator were lawfully engaged in manufacturing paving bricks in this State should it not be exempt from tax to the extent of the capital employed in such manufacture, even if the paving bricks so manufactured had been consumed in carrying out contracts lawfully made by it in constructing streets and highways?

People vs. Morgan, 70 N. Y. 516.

In decisions upon appeals from tax settlement, the court found the companies had been engaged in making and selling iron and steel bridges, buildings, roofs, viaducts, turn-tables, etc., buying from others in a raw, unfinished form, all the necessary iron, steel, and other metals, finishes, shapes and frames and made suitable for use the said materials at its shops ,and framed and erected said material into bridges, roofs and other structures.

> McPherson, J:—"It is quite true that in common speech we do not say that a bridge, or a viaduct, or house or roof is manufactured, but built or erected, or constructed. However, that may be, and the question is not free from doubt; the case before us is very different. The defendant is unquestionably a manufacturing company up to the point where the various parts—beams, rods, girders, bolts, and the rest—are ready to be put together in order to form a complete structure for which they were intended. The preparations of these parts from material, either raw or unfinished, is clearly manufacturing within any accepted definition of the word."

C'wealth v. Keystone Bridge Co., 156 Pa. 500.

C'wealth v. Pittsburg Bridge Co., 156 Pa. 507.

IV.

THE ACT OF 1898, SECTION 4 (b) AND ITS AMENDMENT SHOULD RECEIVE A LIBERAL CONSTRUCTION.

While this Section of the Bankruptcy Act has never been directly considered by this Court, it is submitted that in the case of In re Mary Hatch Riggs, 214 U. S.,

pg., 9, we are given some grounds to encourage us, in our opinion that it will view broadly the purposes for which the Bankruptcy Act of 1898 was intended and will not permit an adjudication of the corporation as bankrupt to be vacated in the absence of clear error on the part of the District Judge. In the case cited the Court refused to mandamus the judges of the District Court for the Southern District of New York to dismiss the proceedings in bankruptcy against the New York Tunnel Company, although it was contended that while the petition in bankruptcy alleged that the Tunnel Company "was engaged in the business of building and contracting" it failed to show that the principal business of the company was "manufacturing, trading, printing, publishing, mining or mercantile pursuits." His Honor Mr. Justice Brewer states:

> "The allegation in the petition in bankruptcy is general in its terms, that the tunnel company is engaged in the business of building and contracting, but it fails to disclose the particular kind of work for which it is contracting, or which it is engaged in building. It might be inferred from the work which it was shown it was doing in this particular case, as well as from its name, that its principal business was that of contracting for the construction of tunnels, but that would be only an inference, and not conclusive. Its principal business may have been that of manufacturing and contracting for such manufacturing and this particular work only a small part of that which it was generally engaged in. What evidence was presented to the District Court to sustain the application for an adjudication in bankruptcy is not disclosed. We may not assume that it was insufficient, or that it failed to make certain or prob-

able that the principal business of the company was that of manufacuring, and contracting for such manufacturing."

If the Court would not disturb the adjudication of the Tunnel Company as a bankrupt on the ground that it may have been engaged in manufacturing, may we not hope that in this case where, beyond question, the actual work is that of manufacturing concrete, and contracting for such manufacturing, the Court similarly will not permit the adjudication to be set aside.

That the Bankruptcy Act should receive a broad construction and, in the words of Sanborn, J., In re First National Bank of Belle Fourche (supra), "that the word 'manufacturing' is a generic term of broad significance, advisedly used by Congress to include many species of corporations" is evident upon the consideration of the purposes for which bankruptcy legislation in general and this law in particular has been enacted.

In construing the Act of 1898, the rule should be followed, that where Congress enacts legislation containing words or phrases which have been judicially construed under other acts upon the same subject, it is presumed to know of such construction and to have adopted the construction of such words and phrases previously made.

U. S. vs. Hermanos Y. Compana, 209, U. S. 337 at 339.

U. S. vs. G. Falk & Bro., 204 U. S. 143, at 152.

The Devonshire, 13 Fed. 39 at 42.

Acts of Congress should be construed in view of the history and circumstances surrounding their enactment.

Platt vs. Union Pacific Railroad 99 U. S. 48. at 62.

U. S. vs. Laws, 163 U. S. 258 at 262, 264;

Mobile & Ohio R. R. Co. vs. Tennessee, 153 U. S. 486 at 502;

Church of the Holy Trinity vs. U. S. 143 U. S. 457 at 463.

Bond vs. Hoyt 13 Pet. 273.

In order to determine the purpose of Congress earlier legislation upon the same subject may be examined to arrive at a proper interpretation of a given act.

Lawrence vs. Allen, 7 How. 785 at 792 and 793.

In re Morton Boarding Stables, 108 Fed., 791. at 794.

The legislative intent prevails over the strict wording of the statute.

Church of Holy Trinity vs. United States 143 U. S. 457;

Oates vs. National Bank, 100 U. S. 239 at 244;

Wheeler vs. McCormick, 8 Blatchf., 267 at 276.

The history of bankruptcy legislation prior to 1898 and the decisions of the courts show that it had been the settled policy to make amenable to the provisions of the Bankruptcy Law all persons who were engaged in trading or purchasing supplies on credit. Thus it was said by Blatchford, J., In re Garrison (supra):

"He was a merchant or tradesman. His occupation was that of a stairbuilder. He bought lumber, nails and other necessary materials, and by the labor of workmen employed and paid by him for the purpose, wrought such materials into stairs, for persons who gave him orders to construct such stairs, and received as compensation from such persons a gross price for the stairs delivered and completed. He was none the less a tradesman because he was, also, a *manufacturer* of the stairs, or because he did not resell the lumber and other materials in the same state in which he bought them, *or because he did not buy and sell completed stairs.* * * * His schedules show debts to the amount of over $7,000, nearly all of the amount contracted during the year 1868, and nearly all of it for lumber for his business."

(The italics are ours.)

This construction was followed by the same judge in refusing one who boarded horses, a discharge under the Act of 1867, on the ground that he bought and sold on credit, In re Odell, Fed. Case No. 10, 426; 9 Benedict, 209, 17 Natl. Bank R. 73.

The same view in considering the operation of the present Act is given by Taft, J. as follows:

"From the days of Henry VIII. to the days of Victoria, the English Bankruptcy acts applied only to traders, and it was not until the act of 1861 that the bankruptcy extended to non-traders. The United States bankrupt law of 1800, the first bankrupt law passed after the constitution was adopted, was an involuntary law, and applied only to traders, bankers, brokers, and underwriters. 2 Stat. 19, 1.

"The question of the classes of persons to be affected by the bankrupt law is one largely, if not

wholly, within the discretion of congress. Chief Justice Marshall said in Sturges v. Crowninshield, 4 Wheat. 122, 194: 'The bankrupt law is said to grow out of the exigencies of commerce, and to be applicable solely to traders; but it is not easy to say who must be excluded from, or may be included in, this description. It is, like every other part of the subject, one on which the legislature may exercise an extensive discretion.' Certainly, it cannot be said that, in enacting the present law, congress has passed the limits of such discretion. The proper purposes of a bankruptcy act like the present are—First (and this was its original purpose), to enable creditors to protect themselves by summary process against the frauds of their debtors in evading the payments of debts; second, to distribute the assets of the debtor equally among his creditors; and, third, to relieve debtors from the burden of debts which, through business misfortunes and otherwise, they have incurred, and which they are unable to pay. * * * The reason why bankruptcy legislation was limited to traders for so many centuries was because it was considered that traders were the class having the greatest opportunity, and therefore most likely, to commit the frauds which bankruptcy acts were passed to prevent. * * * The involuntary feature of the law is chiefly directed against frauds upon creditors. * * *

"Any unincorporated company, and any corporation engaged principally in manufacturing, trading, printing, publishing, or mercantile pursuits, owing debts of $1,000, may be adjudged an involuntary bankrupt. So, too, may a private banker. This is merely an effort to limit the application of the involuntary feature to that class of corporations which would have come under the head of 'traders' at

common law. National banks and state banks are not included, because it was properly assumed by congress that the statutory provisions for winding up such corporations were usually so summary, complete, and drastic that no additional safeguards against frauds were needed."

Leidigh Carriage Company vs. Stengel, 95 Fed. (C. C. A.) 637, at 647, 648.

The Act of August 19, 1841, Sec. 1, provided that all natural persons might become bankrupts, and "merchants; or those using the trade of merchandise, and all retailers of merchandise, all bankers, factors, brokers, underwriters or marine insurers" were subject to involuntary bankruptcy. The Act of 1867 (R. S. Sec. 5122) permitted practically any person or corporation to become a bankrupt, either voluntary or involuntary. The Act of 1898, as amended, is in line with the purpose at all times to protect the creditors of persons who are engaged in a business which requires the purchase of supplies on credit. At first traders were the only persons engaged in such business, but as we have progressed commercially and industrially other classes have been added. Congress, in the act of 1898, seems to have considered the Act of 1867 too broad in permitting the adjudication of banks, railroads and transportation companies, but otherwise there is no evidence that it was its intention, in the specific enumeration of the classes of corporations to be adjudicated bankrupt, to limit the scope of that act.

The opinion of the Referee in Matthews vs. Consolidated Slate Company, 144 Fed., 724 (affirmed by the Dis-

trict Court and also the Circuit Court of Appeals, First Circuit, 144 Fed., 737), is quoted below as giving the best summary that has been found of the record of the proceedings in Congress when the Act of 1898, was passed.

> "Under the Act of 1867, (all money, business, or commercial corporations and joint stock companies), were embraced in an involuntary petition. (R. S. Sec. 5122.) The terms of this Act it would seem were therefore very broad, and they were held to include even a railroad corporation. The same was true also of insurance companies. When the Torrey Bill passed the House of Representatives in 1898, the language was as follows: "Section 3, b,—Any person owing debts to the amount of One thousand dollars, or over, if adjudged an involuntary bankrupt upon an impartial trial, shall be subject to the provisions of this Act, except, (1) a national bank, (2) a person engaged chiefly in farming, or the tillage of the soil, (3) a wage earner." Cong. Rec. Feb. 16, 1898, 55th Congress, Vol. 31, Pt. 2, page 1780.
>
> "Under Section 1 of the Act, the word 'persons' includes corporations. A comparison of this provision with that of the Act of 1867, will make it clear that Congress intended to even enlarge upon the provisions of the Act of 1867, certainly not to limit them. The limitations were only upon national banks, farmers, and wage earners. This identical language of the Bill as it passed the House existed in the original 'Torrey Bill' when first introduced in the 51st Congress. In the analysis of the Torrey Bankrupt Bill attached to a report of the judiciary committee, No. 1,674 to H. R. 9,348, 52nd Congress, 1st Session, appears this explanation of the language of the Act just quoted:

"Section 3. Who may become bankrupts. There is already in existence a satisfactory law for the control and liquidation of national banks. Since the government is responsible for the money issued by these banks, in the event of their failure there is good reason why it should have control of their liquidation. It is said that persons engaged chiefly in farming, or the tillage of the soil, and wage earners do not wish to become subjected to involuntary bankruptcy; the bill does not, therefore, include them among the persons who may become involuntary bankrupts; objection would not be made if they should ask its extension to them. They may voluntarily take the benefits of this Act."

The present language of the Act was the work of the conference committee, consisting of Senators Hoar, Lindsay and Nelson on the part of the Senate, and of Representatives Henderson, Ray and Terry of the House. In the statement of the conferees, which appears in the Congressional Record of the 55th Congress, June 28th, 1898, vol. 31, pt. 7, pages 6,426 to 6,428, under clause 12, is the following:

"12. A change has been made in the bill as agreed upon as to who may be adjudged involuntary bankrupts by including an unincorporated company and corporations engaged principally in manufacturing, trading, printing, publishing or mercantile pursuits. It is believed that such corporations should be subject to the involuntary provisions of this bill. In these times, the formation of corporations for these purposes is very common. *The great railroad and transportation companies and banks incorporated under any law are left to be dealt with by the laws of the State creating them.* It would lead to much confusion and hardship and many complications should we undertake to subject

the great railroads and transportation corporations to the provisions of this Act. It is believed that they can be better dealt with under other laws."

"Thus it appears that it was not the intention of the conferees or Congress to limit the law as it has been construed to be limited under various decisions of the courts under the present Act, but the intention was to exclude 'national banks and the great railroad and transportation corporations.' In the remarks of Congressman Ray, afterwards Chairman of the judiciary committee, and at present the Honorable District Judge for the Northern District of New York, which are to be found on page 6,435 of the Congressional Record, June 28th, 1898, referring to the modification of this language by the conferees, nothing is said by him which would indicate that the language of the Act of 1898 was of a more limited nature than that of the Act of 1867. In fact, Congress intended that the Act of 1898 should be as broad as the Act of 1867, except that National Banks, railroads, transportation companies, farmers and wage-earners should be excluded, but that all business corporations should be amenable to the Act. When the bill was amended in the 57th Congress under the so-called 'Ray bill' the word 'mining' was added to correct certain decisions. * * * That the word 'mining' was intended to be used by Congress in a generic sense is clear from the foregoing attempt at the historical evolution of the Act."

(The italics are ours.)

Henderson, the Chairman of the Judiciary Committee, in advocating this bill in his remarks on "Involuntary Bankruptcy" p. 1786. Cong. Rec. Vol. 31. Pt. 2. says: "A debtor (not a national bank, a per-

son engaged chiefly in farming or tilling the soil or a wage-earner) who owes more than $1,000 may be adjudged an involuntary bankrupt," and on page 1,781 he says: "Corporations cannot become voluntary bankrupts but can be proceeded against in involuntary bankruptcy."

This is also the view expressed in the following cases:

Putnam, J.:"Statutes of this general class are not construed in a literal or narrow way, but like customs legislation, they are held as addressing themselves to the general purpose for which they were enacted. In this case it is of a commercial, business character, therefore, clearly, the expressions of the statute under consideration are to be looked at from that point of view. Whether or not one has become engaged in a particular business would, of course, be differently determined under various statutes, in acordance with the context and peculiar object of each." White Mountain Paper Co. v Morse & Co., 127 Fed. 643, 646 (C. C. A. First Circuit.)

"We are of the opinion that Congress used the words 'mining' and 'manufacturing' in their broad sense; that the terms are not necessarily mutually exclusive; that for any of the purposes of Congress in passing the Bankruptcy Act, distinctions between the classes of minerals and methods of working are immaterial; and that an attempt to distinguish between mining and quarrying would lead to no useful result." In re Matthews Consolidated Slate Company 144 Fed. 737, 741. (C. C. A. First Circuit).

Adopting this construction of the act, in addition to those hereinbefore mentioned the following corporations have been adjudged bankrupt:

A laundry which washed and ironed linen before it was put upon the market for sale, In re Troy Steam Laundering Co., 132 Fed. 266; the farming of sugar cane and making of sugar therefrom, In re Jackson Sugar Co., 11 Am. B. R. 456, both held to be manufacturing; quarrying for granite held to be mining, In re Quincy Granite Quarries Co., 147 Fed. 279; a general stock, bond, grain and brokerage business held to be trading and mercantile pursuits, In re H. R. Leighton & Co., 147 Fed. 311.

"Each case will necessarily turn upon its own facts. It is not to be doubted, however, that in this particular, the law is to be interpreted liberally to effectuate its purposes, i. e., that all business corporations as distinguished from public, quasi-public, money-saving or lending corporations, shall be amenable to bankruptcy."

Collier, Bankruptcy (5th Ed.) p. 71.

It is therefore submitted that in deciding whether a corporation is engaged "principally in manufacturing" and amenable to the Bankruptcy Law, the determination of the exact nature of the business done is far more important than merely considering whether or not it comes within the class of corporations which are ordinarily and often thoughtlessly so designated; and bearing in mind the intention of Congress to exclude from the operation of the Act only banks and transportation companies, such a construction should be given as will, without straining the meaning of the terms used, nevertheless permit of their having effective scope.

IV.

The question as to what a corporation is "principally" engaged in,

"Is to be determined upon the consideration of what the corporation actually does rather than what it is authorized to do."

Columbia Iron Works v. Lead Co. 127 Fed. 101.
In re San Gabriel Sanitarium Co. 95 Fed. 271.
In re Toledo Portland Cement Co. 156 Fed. 83.

V.

If it be contended, as was argued before the Appellate Court that, inasmuch as a voluntary assignment was made by the Monongahela Construction Co., no hardship will be sustained if the bankruptcy proceedings are dismissed, it is submitted that this contention has no bearing on the merits of the question, and further, that should these proceedings be dismissed great hardship will be sustained by the general creditors. For nearly two years the bankrupt's Trustee, elected by the creditors, has been in active discharge of its duties, and should it be dismissed the general creditors must see a considerable part of the assets of the bankrupt go to satisfy the execution creditors who took advantage of the disorganization of the company to obtain judgment by default and levy upon its property a few days prior to the institution of the bankruptcy proceedings. The assignment was made by the Company to prevent any further preferences being obtained by judgment creditors making levies upon its assets, and only after the proceedings in bankruptcy began to be contested.

VI.

THE DECREE OF ADJUDICATION SHOULD NOT HAVE BEEN DISMISSED WITH COSTS.

It is further submitted that should this Honorable Court find adversely to the appellants upon the merits, the Court should direct the decree to be so moulded that the costs of the proceeding should be borne by the estate rather than by the petitioning creditors, two of whom are wage-claimants; and the Trustee should be protected in the administration of the estate which he has been compelled to carry on for a period of over two years pending this decision, in order that it might be preserved for the creditors. One of the errors assigned is the decree of the Circuit Court of Appeals, reversing the District Court, with costs. Upon certiorari this Court has the power to examine the whole case, and make such order as it deems necessary. Panama Railroad vs. Napier Shipping Company, 166 U. S. 280. And upon the filing of the petition for an adjudication in bankruptcy, the court's jurisdiction over the parties and subject matter is established and cannot be questioned. Denver First National Bank vs. Kluj, 160 U. S., page 202, at page 204.

At the time the petition in bankruptcy was filed against this company, there were no cases upon the point which the District Judge was called upon to decide. The defendant had averred its willingness to be adjudged a bankrupt, and this litigation would never have occurred but for the intervention of execution creditors to obtain a preference over numerous general creditors scattered over the country, whom the Receiver, later the Trustee,

having been made a party to the proceedings, has represented. Upon the appeal from the decision of the District Judge, no supersedeas was asked for. It is submitted that the Court has the power to exercise its equitable jurisdiction in bankruptcy, and that it would be most equitable, should the Circuit Court of Appeals be affirmed, to direct that the costs fall upon the estate, in order that they might be borne equally by the general creditors who are the most vitally interested; and at the same time, to direct that the acts of the Trustee be confirmed.

All of which is most respectfully submitted,

ALEXANDER, J. BARRON,

RICHARD A. FORD,

Counsel for Appellants.

Supreme Court of the United States.

No. 68 October Term, 1909.

J. H. FRIDAY, GEORGE E. HARDIE, CHARLES C. HENZEL, et al., Petitioners,

vs.

HALL AND KAUL COMPANY.

On writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

ARGUMENT FOR RESPONDENT.

GEO. L. ROBERTS,
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Of Counsel for Respondent.

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(21,003)

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Statement.

The question involved in this case is the construction only of the word "Manufacturing" as used in the Act of February 5th, 1903, Section 3, amending the Act of July 1st, 1898, known as the National Bankruptcy Law.

The District Court held that the Monongahela Construction Company was a manufacturing corporation, within the meaning of the Bankruptcy Act. On an appeal from that decision the Circuit Court of Appeals for the Third Circuit reversed the District Court and held that the Monongahela Construction Company was not a manufacturing corporation.

The business of the Monongahela Construction Company is fully set forth in the statement of facts, on page 8, of the record in this case.

The part of said statement of facts necessary for the determination of this controversy is as follows: —

The purpose for which said corporation was formed, was organized and created, as set forth in its Charter, is as follows:—

"Corporation is formed for the purpose of constructing, erecting, and repairing railroads, traction lines, duly incorporated, and streets, roads, buildings, structures, works or improvements of public or private use or utility."

3. That the business of the said Monongahela Construction Company has been making, constructing and erecting concrete arches, bridges, buildings, walls and other structure; also excavating, grading and ballasting of roadbeds and laying tracks for railroads. With the exception of the contract with the P. S. & N. R. R. Co. for the making of roadbed and laying of track from Detsch to Paine, Elk County, Pennsylvania, and the remodeling of a warehouse, in which concrete work is the chief item, all the other contracts at the time of the filing of the petition in this case, and the business in which the company has been engaged during the past year has been making and constructing arches, walls, and abutments, bridges, buildings, etc., out of concrete.

4. That in carrying on its business it buys and combines together raw materials, such as cement, gravel and sand in the making of concrete, and supplies labor, machinery and appliances necessary for the proper carrying on of said business, of constructing and erecting concrete arches, piers, buildings and structures and excavating therefore, at such time and places as its contracts call for. That it carries on no other manufacturing business, except the above. The question whether this business is manufacturing or not is left to the determination of the Court.

Argument.

The section of the Bankruptcy Act, under which the question in this case arises, as amended by the Act of February 5th, 1903, Ch. 487, Sec. 3, 32, St. at L., 797, is as follows;

> "Any natural person, except a wage earner or a person engaged chiefly in farming or the tilling of the soil, any unincorporated company and any person engaged principally in manufacturing, trading, printing, publishing, mining or mercantile pursuits, owing debts to the amount of One Thousand Dollars, or over, may be adjudged an involuntary bankrupt upon default or an impartial trial, and shall be subject to the provisions and entitled to the benefits of this Act."

The agreed statement of facts shows that the business in which this company had been engaged for at least one year previous to its insolvency, was the erection of concrete structures of various kinds, excepting one railroad contract which it had with P. S. & N. R. R. Co. That the business of erecting these concrete structures was the only business carried on by it. That it carries on no other manufacturing business except the above. (Record, page 8.)

The Respondent contends that the words "engaged principally in manufacturing" as used in the Bankruptcy Act, have the ordinary and usual significance of those words. Manufacturing in the ordinary acceptation of the term, means the making of articles or commodities that can be transported or sold at some other place than that where they are made.

Loveland's Bankruptcy, page 147.

Defines a manufacturing company as "one engaged in making goods or wares of any kind, producing articles for use from raw or prepared materials by giving these materials new qualities, properties or combinations, whether by hand labor or by machinery."

Manufacturing is defined by the leading Lexicographers, Webster, Worcester, Universal, Standard, as follows:

"WEBSTER"—

Manufacture: (1) To make wares or other products by hand, by machinery, or by other agency; as, to manufacture cloth, nails, glass, etc.

(2) To work, as raw or partly wrought materials, into suitable forms for use; as to manufacture wool, cotton, silk or iron.

Manufacturing: (1) Employed or chiefly employed, in manufacture; as, a manufacturing community, a manufacturing town.

"WORCESTER"—

Manufacture: (1) The process of making anything by art, or by reducing materials into a form fit for use by the hand, or by machinery; as, "An establishment for the manufacture of cloth."

(2) Anything made or manufactured by hand or manual dexterity, or by machinery.

Manufacture: V. (1) To form by manufacture or workmanship by the hand or by machinery; to make by art and labor; as, "to manufacture cloth."

(2) To use or work up in manufactures. "We manufacture our wool."

Manufacturing: To be engaged in manufacture. "A manufacturing village."

"UNIVERSAL"—

Manufacture: By the hand, and a making to make. Act, process or operation of manufacturing wares of any kind; the process of reducing raw materials to a form suitable for use by operations, more or less complicated.

(2) That which is manufactured, anything made from raw materials.

Manufacture: V. (1) To make or fabricate by art and labor from raw materials; to form by workmanship.

(2) To employ in work; to work up into suitable forms for use; as to manufacture wool, etc. To be occupied or engaged in the manufacture of wares.

Manufacturing: (1) Engaged or employed in the manufacture of wares.

(2) Pertaining to or connected with manufacture or manufacturers; as, manufacturing interests.

"STANDARD"—

Manufacture: (1) To make or fashion by working on or combining materials, form or produce by some industrial process; fashion by hand or machinery; especially when done in considerable quantities and as a regular business; as, to manufacture cotton goods; to manufacture furniture.

(2) To work or fashion by labor into useful or desirable forms; form or make into something; as, to manufacture leather into shoes; to manufacture rags into paper.

(3) To fabricate, as that which is not genuine; create by artifice; simulate; counterfeit; as, to manufacture praise; to manufacture public opinion.

Manufacture: N. (1) The operation of making articles for use by working on or combining material; a production of goods, etc., by industrial process or art; as, the manufacture of lace.

(2) Anything made by industrial art or process; manufactured articles collectively, also figuratively, the product or result of any process; as, silk manufactures.

These definitions show, that the accepted and popular meaning of the term "manufacture" is applied to goods and wares that are capable of being made and transported and sold in places, other than those of their manufacture. In no definition given by any lexicographer, is the term manufacturing applied to one engaged in the production or construction of an article which must be affixed to the realty, and whose use and value is destroyed the moment it is detached, from the real estate to which it is affixed.

In the case of *Keystone Coal Company,* 109 Fed. Rep., 872, Buffington, J.

> "It was held, that a coal mining corporation is not a corporation engaged principally in manufacturing, and cannot be adjudged a bankrupt under this section."

That case, also holds

> "That the bankruptcy act must be strictly construed and that Congress only intended that those corporations should be included which come within the ordinary and accepted meaning of its provisions."

In *re Chicago-Joplin Lead, etc. Co.,* 104 Fed. Rep., 67.

> "The petition must allege, and it must be proved, that the corporation has been engaged in one of the businesses enumerated; and the burden of proof is on the petitioning creditors. It is not sufficient to allege that proof of the corporation is furnished under its charter to carry on such business."

In *re Columbia Iron Works vs. National Lead Co.,* 127 Fed. Rep., 29.

> Holds, "That a company organized for the purpose of repairing vessels of all kinds, and the conducting of general ship building business, etc., * * * * was a manufacturing company within the meaning of the bankruptcy act, for the reason that the vessels or ships are articles of commerce, and the facility with which they can be sold or exchanged, is simply one of size."

That company, however, had a regular shop or factory in which they fashioned various raw materials into finished parts. The distinction as to the character of the business is expressly recognized in that case, and the Court says:

> "The distinction would seem to run along the lines of those articles which are more or less fixed in place,

and not ordinarily subjected to bargain and sale as articles of commerce, as distinguished from those which are manufactured and ordinarily regarded as subject to manual transfer—articles of trade in the common course of mercantile business."

The only case that was cited in favor of the position taken by the District Court is,

In *re Niagara Construction Company*, 127 Fed. Rep. 782, but the decision in that case was made because the matter had been entirely heard and determined, and the funds distributed through the Courts of Bankruptcy before the question was raised.

The District Court held that the plasterer who makes mortar in a box in front of a house and carries it in and puts it on the wall, where it becomes plaster, is a manufacturer.

In all the experience of this Court, I doubt if any member ever heard the term "manufacturer" applied to the man who mixes and puts mortar on the walls of a house, where it stays as long as the building stands, and has no commercial value when separated from the walls to which it is affixed. No use of the term "manufacture" or "manufacturer," in any proper sense, could be applied to that business, so we contend that this company is not a manufacturer within the meaning of the terms as used by Congress, for the reason that not a single article made by it could be moved from the place where it was made, and sold, or even given away for use anywhere else.

We contend that this case is controlled by the case of *Butt et al. vs. C. F. MacNichol Const. Co.*, 140 Fed., p. 840.

The syllabus of which is as follows:

"A corporation engaged in the business of building bridges, wharves, bulkheads, and driving piles, under contract, which has no plant where it manufactures bridges for the market, but does all of its work on the

ground after contracting therefor, is not engaged in manufacturing, within the meaning of Bankruptcy Act, July 1st, 1898, c. 541, 30 Stat. 547 (U. S. Comp. St. 1901, p. 3424), and is not subject to be adjudged an involuntary bankrupt thereunder."

In the opinion in that case, on page 841, the Court says:

> "It was held, in the case of in *re Capital Pub. Co.*, 3 MacArthur, 405, 40 Am. Rep. 446, in construing the bankrupt statute, that the word 'manufacture' should be construed to mean where raw materials, etc., are wrought by hand or art or machinery into the commodities for use."

In discussing the question, the Court says:

> "There can be no doubt that the word 'manufacture' was used in the statute in the limited sense in which it is commonly understood. * * * * The industries to which the dictionaries and the writers on political economy limit this term are where the raw materials or natural substances are wrought by hand, art or machinery into commodities for use; and the examples given are cloths, iron, shoes, cabinet work, glass, cotton, and silk goods, etc. This limitation of the term 'manufacture' is to be adopted as the true meaning of the bankruptcy law."

And on same page, the Court further says:

> "To construe this act to mean that corporations which are engaged in building bridges, wharves, bulkheads, and driving piles for foundations for buildings are engaged in manufacturing, trading, or mercantile pursuits would be to distort the meaning of the language employed therein, and thus apply the statute to a class of corporations which was not contemplated by the framers of this act. If we would construe the act in question as applicable to a corporation which builds bridges, wharves, bulkheads, and drive piles for foun-

dations for buildings, it would necessarily follow that a corporation which engages in the business of erecting a house or building a barn, is a manufacturer within the meaning of the statute. It is commonly understood that corporations engaged in erecting houses and other buildings which require the raw material to be sawed, planed, fitted, and put together are construction and not manufacturing companies. The appellee had no principal place of business, nor was it engaged in manufacturing bridges to be placed upon the market, as such, but was simply engaged in constructing bridges, wharves, and bulkheads on the premises of those who employed it and driving piles for foundations for buildings under contract."

And on page 843, the Court says:

"It is contended by the petitioner that there is no reason why a construction company should not be subject to the provisions of the bankruptcy law; that, if the law is not so construed as to include this class of corporations, great injustice may be done by permitting such companies to prefer certain of their creditors to the exclusion of others. While such may be true, the Court is not in a position to remedy the evil of which the petitioners complain, inasmuch as it has no power to alter, amend, or change existing law. We can only apply the law to such cases as are contemplated by the statute."

In Pennsylvania it was held, in the case of the *Commonwealth vs. Keystone Bridge Company*, 156 Pa., S. 500:

"That the company being engaged exclusively in making and selling iron and steel bridges, buildings, roofs, viaducts, turntables and other articles of machinery, composed wholly or in part of wood, iron, steel or other suitable material, buying from others necessary materials in the raw state and finishing them suitable for use at its own shop in Pittsburgh, was a manufacturing corporation."

In the opinion of the Court below, in that case, which was adopted in the Supreme Court as its opinion, the Court says:

> "It is quite true that in common speech we do not say that a bridge or viaduct or house or roof is manufactured, but built or erected or constructed, and it might perhaps be true that a corporation, whose only business was the erection of such structures after the parts had been fashioned and fitted by others, would not be accurately described as engaged in 'manufacturing.'"

The Court further says:

> "The defendant's original charter was under an act which only uses the word 'manufacture.'"

It cannot be contended that the Bankruptcy Act of 1898, includes within it every character of business. It has been repeatedly held that unless the party against whom a petition was filed is engaged in one of the kinds of business enumerated in the act, it does not come within its provisions and cannot be adjudged a bankrupt. The act must be strictly construed on all questions relating to jurisdiction, and the respondent earnestly contends that under no proper construction of the act can a corporation engaged in the business that this corporation was engaged in, be brought within its terms and adjudicated a bankrupt under the provisions thereof.

The case of *First National Bank of Belle Furche*, 152 Fed. Rep., page 64, in which the Circuit Court of Appeals for the Eighth Circuit holds: "A corporation which is principally engaged in building concrete arches and bridges, and dressing stone, is a manufacturing corporation, and may be adudged a bankrupt," can be readily distinguished from this case on the facts.

The Court decided that case practically upon the grounds of estoppel, holding that the creditor making the objection after adjudication had been made, and with knowledge that

the application was pending, was too late in asking the Court to set aside the adjudication after it had been made, not having objected by demurrer or otherwise to the petition filed.

The petition in that case on its face showed that the company was engaged in manufacturing, and there is nothing in the report showing that any evidence was taken to disclose what business it was actually engaged in. The expression of the Court, therefore, in relation to manufacturing is simply *dicta*.

That case can also be further distinguished in that the Widell-Finley Company, as shown by the petition filed, was engaged in dressing and selling stone, while in this case the Monongahela Construction Company does not manufacture or sell anything. Its products cannot be removed from the place where they are made, and are always attached to the soil.

In this case, however, the jurisdiction of the Court has been challenged from the inception of the proceedings and all that has been done since the very commencement of the case has been done with full knowledge that the action would be subject to review by the Appellate Courts.

It is insisted in the argument for appellants that the history of the Bankruptcy Law should be taken into consideration by this Court, in arriving at the construction of the words involved in this case. This Court has already determined that debates in Congress are not to be considered in the construction of acts passed by it.

> *United States vs. Freight Association*, 166 U. S., 290.
>
> "Debates in Congress are not appropriate sources of information, from which to discover the meaning of the language of a statute passed by that body."

The respondent contends that the words in controversy in this act should be construed according to their common and accepted meaning, and that the principles which apply to the construction thereof are governed by the following cases, heretofore decided by this Honorable Court.

Lewis, Trustee vs. United States, 92 U. S. 618.

From the opinion of the Court on page 621.

> "Where the language of a statute is transparent, and its meaning clear, there is no room for the office of construction. There should be no construction where there is nothing to construe. *United States vs. Wiltberger,* 5 Wheat. 95; *Cherokee Tobacco,* 11 Wall 621."

United States vs. Temple, 105 U. S. 97.

From the opinion of the Court on page 99.

> "Our duty is to read the statute according to the natural and obvious import of the language, without resorting to subtle and forced construction for the purpose of either limiting or extending its operations. *Waller vs. Harris,* 20 Wend. (N. Y.) 461; *Pott vs. Arthur,* 104 U. S. 735. When the language is plain we have no right to insert words and phrases, so as to incorporate in the statute a new and distinct provision."

The appellants contend that this company should be adjudged a bankrupt, because for nearly two years the Trustee has proceeded in the active discharge of its duties in this matter. The Trustee is the same as the Assignee under Deed of Assignment made by this company, and the rights of all parties have been so protected that no hardship will be suffered by any one if the decision of the Circuit Court of Appeals is affirmed.

It has taken thirty-seven (37) pages of an argument for the appellants to place a meaning on the terms, "engaged

principally in manufacturing." This fact alone shows that the construction contended for by them can only be sustained, in the languauge of Judge Gray, by a forced construction founded on verbal refinements.

The opinion of Judge Gray tersely and distinctly states the reasons why the construction contended for by the respondent should prevail, in the following part of his opinion:

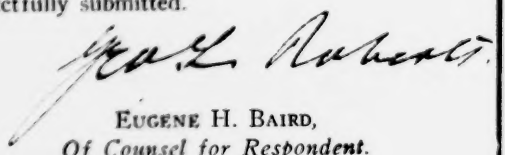
> "The words 'manufacture' and 'manufacturer' seem to us to have a well ascertained and defined meaning. There is no confusion in the general concept conveyed by these words, as referring to the making of raw material or natural substances by hand, art or machinery, with more or less skill, into commodities for use. The leading lexicographers all agree as to this general signification. No special technical or legislative use of them, different from their general or popular use, had been suggested. *It appears from the agreed statement of facts that the Monongahela Construction Company carried on no manufacturing business, unless the business of 'making, constructing and erecting concrete arches, bridges, buildings, walls and other structures; also excavating, grading and ballasting of roadbeds and laying tracks for railroad,' be such a business.* The alleged bankrupt in this case, therefore, was a builder or constructor of concrete arches, bridges, buildings, walls and other structures. These were erected *in situ*, and when erected, were attached to and became part of the real estate. No one in ordinary parlance would ever think of saying that such a builder was a manufacturer of arches, houses, &c. *It is only by a forced construction, founded on verbal refinements, that such a conclusion can be arrived at.* It is true, that such a builder assembles and combines the raw materials of cement, sand and water, which are mixed with more or less skill with tools and appliances adapted for such purpose, and the composite thus formed being poured into moulds, gradually and by successive repe-

titions of the process, forms the arch, building or wall intended to be erected. We cannot see upon what possible ground a person or corporation, engaged in this work is to be distinguished from one engaged in the erection of an arch, building or walls with other materials, such as stone, bricks and mortar, or how, except arbitrarily, the one can be called a manufacturer and the other not."

(The italics are ours.)

We respectfully submit that the action of the Circuit Court of Appeals was in accordance with the true spirit, intent and meaning of said Act, and that the same should be affirmed;

All of which is respectfully submitted.



EUGENE H. BAIRD,
Of Counsel for Respondent.

structures, whose principal business is making and constructing arches, walls, bridges and other buildings out of concrete, and which buys and combines together raw materials in making the concrete and supplies labor, machinery and materials at the place that the contracts call for, is a corporation engaged principally in manufacturing within the meaning of § 4 of the Bankrupt Act as amended February 5, 1903, c. 487, 32 Stat. 797.

158 Fed. Rep. 593, reversed.

THE Monongahela Construction Company, a corporation organized under the law of Pennsylvania, was, in an involuntary proceeding, adjudged a bankrupt in the District Court for the Western District of Pennsylvania. Upon a petition for review, filed by a judgment creditor, the adjudication was set aside upon the ground that the construction company was not "a corporation engaged principally in manufacturing," as found by the bankrupt court. The opinion of the Circuit Court of Appeals is reported in 158 Fed. Rep. 593.

From the agreed statement of facts it appears:

1st. That the Monongahela Construction Company's charter sets out that it was organized "for the purpose of constructing, erecting and repairing railroads, traction lines, duly incorporated, and streets, roads, buildings, structures, works or improvements of public or private use or utility."

2d. That its principal business had been "making and constructing arches, walls, and abutments, bridges, buildings, etc., out of concrete."

3d. That "in carrying on its business it buys and combines together raw materials, such as cement, gravel and sand in the making of concrete, and supplies labor, machinery and appliances necessary for the proper carrying on of said business, of constructing and erecting concrete arches, piers, buildings and structures, and excavating therefor at such time and place, as its contracts call for."

4th. It has no permanent shop or factory, but has a warehouse.

Mr. Alexander J. Barron, with whom *Mr. Richard A. Ford* was on the brief, for appellants:

A corporation engaged in the erection of concrete walls, piers, abutments, bridges, etc., is, from the very nature of its work, of necessity, principally engaged in manufacturing. *Re Bank of Belle Fourche*, 152 Fed. Rep. 64; *Columbia Iron Works* v. *National Lead Co.*, 127 Fed. Rep. 99, 102; *Re Niagara Contracting Co.*, 127 Fed. Rep. 782; *Re Marine Const. Co.*, 130 Fed. Rep. 446; *Re Matthews Slate Co.*, 144 Fed. Rep. 737; *Re Quincy Granite Quarries Co.*, 147 Fed. Rep. 279; *Re Leighton & Co.*, 147 Fed. Rep. 311; *Re Troy Steam Laundering Co.*, 132 Fed. Rep. 266; *White Mountain Paper Co.* v. *Morse & Co.*, 127 Fed. Rep. 643; *Re Church Construction Co.*, 157 Fed. Rep. 298; *Tidewater Oil Co.* v. *United States*, 171 U. S. 216.

Manufacture is transformation—the fashioning of raw materials into a change of form for use; so held in *Kidd* v. *Pearson*, 128 U. S. 1, 20, and this definition is generally adopted by the lexicographers such as Bouvier and Anderson, Webster (1901) and Worcester. See also *Carlin* v. *Western Assurance Co.*, 57 Maryland, 526; 5 Words and Phrases, 4347.

The bankruptcy act is not limited to those merely engaged in manufacturing commodities. *Re Rutland Realty Co.*, 157 Fed. Rep. 296.

Construction companies are not necessarily excluded from the operation of the bankruptcy act. *Re Garrison*, Fed. Cases, No. 5,254. Under the act of 1898, the companies have been held to be engaged in manufacturing in *Re Columbia Iron Works*, 127 Fed. Rep. 99; *Re Niagara Contracting Co.*, 127 Fed. Rep. 782; *Re Church Construction Co.*, 157 Fed. Rep. 298; *Re Marine Construction Co.*, 130 Fed. Rep. 446. See also state courts' decisions. *People* v. *Morgan*, 70 N. Y. 516; *Commonwealth* v. *Keystone Bridge Co.*, 156 Pa. St. 500; *Commonwealth* v. *Pittsburg Bridge Co.*, 156 Pa. St. 507.

The act of 1898, § 4*b* and its amendment should receive a liberal construction. *Re Mary Hatch Riggs*, 214 U. S. 9.

Where Congress enacts legislation containing words or phrases which have been judicially construed under other acts upon the same subject, it is presumed to know of such construction and to have adopted the construction of such words and phrases previously made. *United States* v. *Hermanos y Compania*, 209 U. S. 337; *United States* v. *G. Falk & Bro.*, 204 U. S. 143, 152; *The Devonshire*, 13 Fed. Rep. 39, 42.

Acts of Congress should be construed in view of the history and circumstances surrounding their enactment. *Pratt* v. *Union Pacific Railroad*, 99 U. S. 48, 62; *United States* v. *Laws*, 163 U. S. 258, 262; *Mobile & Ohio R. R. Co.* v. *Tennessee*, 153 U. S. 486, 502; *Church of the Holy Trinity* v. *United States*, 143 U. S. 457, 463; *Bond* v. *Hoyt*, 13 Pet. 273. In order to determine the purpose of Congress earlier legislation upon the same subject may be examined to arrive at a proper interpretation of a given act. *Lawrence* v. *Allen*, 7 How. 785, 792; *Re Morton Boarding Stables*, 108 Fed. Rep. 791, 794. The legislative intent prevails over the strict wording of the statute. *Church of the Holy Trinity* v. *United States*, 143 U. S. 457; *Oates* v. *National Bank*, 100 U. S. 239, 244; *Wheeler* v. *McCormick*, 8 Blatchf. 267, 276.

Mr. Geo. L. Roberts, with whom *Mr. Eugene H. Baird* was on the brief, for respondent:

The words "engaged principally in manufacturing" have their ordinary and usual significance. Manufacturing in the ordinary acceptance of the term, means the making of articles or commodities that can be transported or sold at some other place than that where they are made. Loveland's Bankruptcy, 147. See definitions of "manufacturing" by the leading lexicographers, such as Webster, Worcester, Universal, Standard. In no definition given by any lexicographer, is the term "manufacturing" applied to one engaged in the production or construction of an article which must be affixed to the realty, and whose use and value is destroyed the moment it is detached from the real estate to which it is affixed. See

Re Keystone Coal Co., 109 Fed. Rep. 872; *Re Chicago-Joplin Lead Co.*, 104 Fed. Rep. 67; *Re Columbia Iron Works* v. *National Lead Co.*, 127 Fed. Rep. 29; *Re Niagara Construction Co.*, 127 Fed. Rep. 782, and other cases cited by appellant. *Butt* v. *C. F. MacNichol Const. Co.*, 140 Fed. Rep. 840.

In arriving at the construction of the words in this case, debates in Congress are not to be considered any more than in the construction of other acts passed by it. *United States* v. *Freight Association*, 166 U. S. 290. The words in controversy should be construed according to their common and accepted meaning. *Lewis* v. *United States*, 92 U. S. 618, 621. There should be no construction where there is nothing to construe. *United States* v. *Wiltberger*, 5 Wheat. 95; *Cherokee Tobacco*, 11 Wall. 621; *United States* v. *Temple*, 105 U. S. 97.

MR. JUSTICE LURTON, after stating the facts as above, delivered the opinion of the court.

Section four of the Bankrupt Act, as amended by § 3 of the act of February 5, 1903, c. 487, 32 Stat. 797, reads thus:

"Any natural person, except a wage-earner, or a person engaged chiefly in farming or the tillage of the soil, any unincorporated company, and any corporation engaged principally in manufacturing, trading, printing, publishing, mining or mercantile pursuits, owing debts to the amount of one thousand dollars or over, may be adjudged an involuntary bankrupt upon default or an impartial trial, and shall be subject to the provisions and entitled to the benefits of this act. Private bankers, but not national banks or banks incorporated under State or Territorial laws, may be adjudged involuntary bankrupts."

The single question is, whether the Monongahela Construction Company, upon the facts stated above, was a corporation principally engaged in the business of "manufacturing," within the meaning of the act. If it was, the adjudication should stand.

The corporate powers of the company were very broad. It